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REPORTS
OF
CASES IN LAW AND EQUITY,
ARGUED AND DETERMINED IN THE
SUPREME COURT OF GEORGIA,
AT ATLANTA.

PART OF JULY TERM, 1872.

VOLUME XLVI.

By HENRY JACKSON, REPORTER.

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OF THE
SUPREME COURT OF GEORGIA,
DURING THE PERIOD OF THESE REPORTS.

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HON. H. K. McCAY, JUDGE,.....*Americus.*
HON. W. W. MONTGOMERY, JUDGE,.....*Augusta.*

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NOTE.

By Act of 1860 (Revised Code, section 4210), the decisions of the Supreme Court are required to be "announced by a written synopsis of the points decided." These decisions, thus announced from the bench, are, by the Judges, made the head-notes to the cases. Those head-notes followed by (R.) are by the Reporter.

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CASES
ARGUED AND DETERMINED
IN THE
Supreme Court of the State of Georgia,
AT ATLANTA,
JULY TERM, 1872.

PRESENT—HIRAM WARNER, CHIEF JUSTICE.
H. K. McCAY,
W. W. MONTGOMERY, } JUDGES.

JOHN DOE, *ex dem.* of JAMES U. HORNE, *et al.*, plaintiff in error, *vs.* RICHARD ROE, casual ejector, and J. POLK HOWELL, tenant in possession, defendants in error.

1. Where a tenant in common conveys the whole lot to a third person, and the grantee took possession, claiming the entire lot as his own, this action constitutes a disseizin and ouster of the other tenants in common, and they are barred from asserting their right to such property after the expiration of seven years. (R.)
2. Where a prescriptive title is set up in defense to an action of ejectment, it is competent for the defendant to show the good faith with which he purchased. (R.)

Ejectment. Tenants in common. Adverse possession.
Before Judge PARROTT. Whitfield Superior Court, April
Term, 1872.

VOL. XLVI. 2.

Horne vs. Howell.

The demises laid in plaintiff's declaration were as follows, to-wit: 1st, of Robert S. Denham and his wife Sarah, to lot one hundred and twenty-nine, eleventh district, third section; 2d, of William D. Bevil and his wife Catherine Bevil, to the same lot; 3d, of James U. Horne to the same lot; 4th, of James U. Horne to the undivided two-thirds part of the same lot. The defendant pleaded the general issue and the statute of limitations. The jury returned a verdict for the defendants. Plaintiff moved for a new trial upon several grounds. The motion was overruled, and plaintiff excepted and assigns said ruling as error.

All the facts necessary to a clear understanding of the case are fully set forth in the decision of the Court.

MCCUTCHEN & SHUMATE, by brief, for plaintiff in error. Rights of tenant in common: Code sec. 2275, sec. 2276; Adverse possession against cotenant: Code, sec. 2277; Seizin of one tenant is the seizin of other: 2d Greenleaf's Ev., sec. 14; Kent's Coms., vol. iv., sec. 64; Code, sec. 2277; Greenleaf's Cruise on Real Property: vol. ii., sec. 15; Adams on Ej't, 136; Tyler on Ej't, 477; What is Actual Ouster? 3d Black. Coms., 167, 170.

JOHNSON & McCAMY; D. A. WALKER, by brief, for defendants. Possession of one tenant in common is the possession of other, when? 1st Cowp. R., 217; 1st Hill on Real Property, 588; 3d Pet. R., 51; 1st Conn. R., 364; 5th Day's R., 188; 3d Metc. R., 91; 4th Mason's R., 330; 9th Cowen's R., 550; 7th Wheat R., 120; Wash. on Real Property, 567; 4th Paige Ch. R., 178; 10th Pick. R., 160; 13th Maine R., 337; 2d Taylor, 259; 8th B. Monroe's R., 352; 13th J. R., 406; 3d How. R., 689; 4th Dev. & Bat. R., 54; 15th Vermont R., 552; Ang. on Lim., sec. 403; Taylor on Ej., 926; 1st Wash. on Real Property, 567; 2d Black. Coms., 194; 5th Pet. R., 402.

WARNER Chief Justice.

This was an action of ejectment brought by the plaintiffs against the defendant, to recover possession of a lot of land in Whitfield county. The jury, on the trial of the case, under the charge of the Court, found a verdict for the defendant. A motion was made for a new trial, which was overruled, and the plaintiffs excepted. The evidence, as contained in the record, is, in substance, as follows:

The lot of land was granted by the State to the minors of Joseph Barnes, Emily, Caroline and Sarah. Emily married Andrew J. Denham, Caroline married William D. Bevil, and Sarah married Robert S. Denham. Robert S. Denham and William D. Bevil conveyed the lot to Owen H. Kenon by deed, executed 25th November, 1845, recorded 12th October, 1855. Kenon conveyed said lot to James U. Horne, 18th November, 1850—deed recorded 12th October, 1855. It was admitted on the trial that the said lot lies in Whitfield county, that defendant was in possession at the beginning of the suit, and that Horne, before commencement of the action, demanded to be let into possession, with J. P. Howell, as tenant in common of the premises in dispute, which was refused by Howell; that similar demand was made by Horne on Evan S. Howell, father of defendant. It was also admitted on the trial, that plaintiff had commenced a *previous* action of ejectment against defendant for recovery of the whole of the lot in dispute, on same demises, in the Superior Court of Whitfield county on 2d October, 1868, in which action defendant had been duly served, and that on 6th September, 1869, plaintiff paid costs on said first action, and had it dismissed regularly, and within six months thereafter commenced this action. The above are the material facts upon which plaintiff relied.

The following facts were proved by defendant: Andrew J. Denham and Emily J. Denham, his wife, conveyed the whole of the lot in dispute to John W. Beck, by deed executed

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March 10th, 1856—recorded June 24th, 1856. Beck conveyed an undivided half interest of said lot to William Mills by deed executed 3d September, 1861—recorded 9th September, 1861. Beck also conveyed the undivided half interest in said lot to Evan S. Howell by deed executed 3d September, 1861—recorded 9th September, 1861. Mills conveyed to Evan S. Howell his half interest in said lot by deed executed 11th June, 1862, and recorded 2d July, 1862. It was admitted that Fleming Payne became tenant of Beck on said land 9th April, 1857. The Court permitted E. S. Howell to testify on the stand, (over the objection of plaintiff's counsel,) that "he and Mills, in the summer of 1860, bought the land from Beck and paid a portion of the purchase price in money and gave note for the balance." Howell testified that he and Mills went into possession in fall of 1860. Beck's tenant attorned to them; they and their tenant's kept possession thenceforward till January, 1864; when they left, they got one Wilson to get one Haddock to take possession. Howell returned in the fall of 1865 and found Haddock in possession. Howell says he never heard Beck's title questioned. John Wilson testified that Beck put Payne on the land in 1857, and that the land has been continuously occupied since; he got Haddock to go on it in 1864; Haddock stayed until Howell's sons took possession. Whitefield testified that he was present when A. J. Denham sold to Beck; Denham said he had good title—one interest in right of his wife and two interests by purchase from R. S. Denham and Bevil—and could make good title. This conversation was had the day before the trade was actually made. This witness says, in said conversation something was said about the claim of one "Holcomb" or "Holkins" to the land, and that said claimant had been shipwrecked. Beck testified that he bought the whole of the lot from A. J. Denham in good faith, Denham representing that he had title thereto; that he put Payne in possession of the lot as tenant in the latter part of March, 1857; had held by his tenants continuously up to the date of sale to Howell.

Plaintiff produced rebuttal testimony of A. J. Denham, that he married one of said minors; owned but one undivided third of said land; sold that to Beck; told Beck who owned the other two-thirds; Beck wrote the deed; represented to him that he required a deed to the whole lot in order to get possession; confided to Beck as to the kind of deed he should make; is very positive that he told Beck repeatedly that he could not sell him but one-third, and allowed Beck to write such deed as he (Beck) thought necessary, that he and Beck also talked of the adverse claim of one "Holcomb" or "Holkins."

The plaintiffs claim the right to recover in this case as tenants in common, and the main question made on the argument before this Court, was whether the defendant, under the facts of the case, held the possession of the land *adversely* as against the plaintiffs, who claim to be tenants in common with him, so as to be protected in his possession by prescription under the statute, which was pleaded as a defense to the plaintiff's action. The defendant claims the right to the seven years' possession of the land under color of title derived from Beck, and the question is, whether Beck's title and possession of the land under it, and those claiming under him, was adverse to the other tenants in common? Denham and his wife Emily, one of the tenants in common, conveyed the whole lot to Beck in 1856, and he entered into the possession of it under that deed, or held possession of it by his tenant, which deed was duly recorded. This act of Denham and wife, one of the tenants in common, conveying the whole lot to Beck, who took possession of it, claiming the entire lot as his own, was a disseizin and ouster of the other tenants in common, and Beck, and those claiming under him, by deed to the whole lot, held the possession thereof adversely to the other tenants in common, and if they failed to assert their right to recover the same until the expiration of seven years, they were barred. There can be no doubt that one tenant in common may disseize and oust another tenant in common,

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and it is a general rule that when one enters into the possession of land under a deed duly recorded, as in this case, claiming title to the whole tract specified in the deed, and exercises the usual acts of ownership over it, such possession is adverse to all persons who claim title to the same land, although such persons may have been tenants in common. The possession under a title and claim to the *whole lot*, is hostile to, and adverse to the title and claim of those who claim a *part thereof* as tenants in common. The evidence of Howell, which was objected to, was properly admitted to show that the purchase of the land from Beck was made in good faith, as it tended to sustain the defense relied on by the defendant. In view of the facts contained in the record, there was no error in overruling the motion for a new trial.

Let the judgment of the Court below be affirmed.

MILO S. FREEMAN, plaintiff in error, *vs.* **WILLIAM A. CHERRY**, defendant in error.

Under the provisions of the Revised Code, sections 2738, 2739 and 2123, accommodation indorsers of a negotiable security, payable at a chartered bank, are considered as securities merely, and if one pays off the debt he can compel the others to contribute.

Accommodation indorsers. Contribution. Before Judge COLF. Bibb Superior Court. October Adjourned Term, 1871.

William A. Cherry filed his bill against Milo S. Freeman, J. W. Blackshear and Thomas J. Flint, for contribution. The bill set forth the following condition of affairs: In 1868, Blackshear, being indebted to the Home Insurance Company, procured complainant, Freeman and Flint to indorse his note, negotiable at bank, simultaneously, the name of the payee being left blank, all the parties understanding that the payee was the insurance company. It so happened that complain-

ant was the first to place his name on the back of the note. Without complainant's knowledge or consent, his name was subsequently inserted as payee. Suit was brought on said note, and at the November Adjourned Term, 1869, of Bibb Superior Court, a judgment was rendered against complainant as first indorser, said Flint as second indorser, and said Freeman as third indorser. Execution issued on said judgment for \$500, principal and interest to April 5th, 1870, and costs amounting to \$84.31, which complainant has been compelled to pay. Blackshear and Flint are now and were insolvent at the time judgment was rendered. Prayer that Freeman may be decreed to pay to complainant one-half the amount of said execution.

Blackshear and Flint filed no answer. Freeman answered the bill, but set up no facts necessary to an understanding of the decision of the Court. The jury returned the following verdict: "We, the jury, find for W. A. Cherry \$286.85, with interest to date." Whereupon the defendant, Freeman, moved for a new trial upon the following, among other grounds:

Because the Court erred in charging the jury as follows, to-wit: "I charge you, gentlemen of the jury, that at common law and under the decisions of the Supreme Court of Georgia prior to the adoption of the Code, indorsers on promissory notes were not bound to contribute, but were bound each to pay the whole debt in the order of their indorsement, the one first indorsing first bound, and could not collect anything out of the indorsers after him. The Legislature of Georgia has, however, seen fit to change the law, and to make accommodation indorsers bound as sureties. Section 2123 of the Code declares an accommodation indorser to be merely a surety, and since the law require sureties to contribute, accommodation indorsers are also bound to contribute; that is, if one of several accommodation indorsers is forced to pay the note indorsed, he may require the others to pay, each his share, to be divided equally among the solvent indorsers.

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And I charge you, gentlemen of the jury, that if, from the evidence, you believe that that the indorsers on the note in question were accommodation indorsers, (that is, indorsers having no interest in said note,) and that Cherry paid the judgment obtained against them on said note, and that Black shear and Flint are insolvent, then Cherry is entitled to recover from Freeman half the amount paid, with interest from the time of payment."

The motion for a new trial was overruled by the Court and plaintiff in error excepted, and assigns said ruling as error.

JEMISON & NISBET, for plaintiff in error, submitted the following brief: The codifiers had no authority to make changes in the law: Acts of 1858; preface to Code. Prior to the adoption of the Code, accommodation indorsers were not bound to contribute: 7th Johns., 361; 3d Peters, 470 5th Howard, 276; 21st *Ibid.*, 432; 1st Kelly, 205; 4th *Ibid* 106, 267. The law as to contribution is not changed by sec. 2123 of the Code. Liability of surety: Code, sec. 2120. Liability of indorser: Code, sec. 2738. The Code makes no change in the law merchant as to bankable paper. The Code did not become law until ratified by the approval of Congress, June 25th, 1868, one month after the note in question was made.

LANIER & ANDERSON, for the defendants.

McCAY, Judge.

Our Code, section 2123, has this language under the heading of "Principal and Security": "The form of the contract is immaterial provided the fact of suretyship exists; hence an accommodation indorser is considered *merely* as a surety."

It is difficult to put *any* meaning upon this provision of the Code if it does not mean that accommodation indorsers are liable to contribution. *All* indorsers are, in a *certain sense*, securities. They all undertake for the maker of the

note. But ordinary indorsers receive value, since *prima facie* an indorsement implies that the indorser, not the holder of the note, passed it to the indorsee for value.

In this State, since the act of 1826, *all* indorsers of notes not payable at bank are securities, in almost every respect, save that they are liable to each other in the order of their indorsements. They are not entitled to notice; they may be sued in the same action with the maker, and they may give notice to sue as other securities. Our Code, section 2738, says: "In ordinary indorsements the contract of the indorser is to pay the money, if the *parties* to the instrument primarily liable thereon fail to pay according to the terms thereof; hence, if there are several indorsers each is liable to subsequent ones in the order of their several indorsements."

But section 2123, which we have quoted above, says that whatever may be the *form* of the contract, accommodation indorsers are considered as securities merely. It would seem wholly useless to say this if they are to be liable as other indorsers. The form of every contract of indorsement is the same; *prima facie*, it imports that the indorser passes the note to the indorsee for value. This is the ordinary meaning of the contract, and as provided by section 2738, it guarantees that not only the makers but every previous indorser will pay, and each is liable to the other in the order in which they stand. The fact of securityship does not exist as between one indorser and the others. Each gives and each receives value. But in the case of accommodation indorsers, there is no sale or passage of the note from one indorser to the other—the fact of suretyship does exist.

In such a case section 2123 says, however the form may be, they are securities merely. As to the maker, they are all securities in every indorsement, and there is no propriety in the language of section 2123, unless it means to say that they are securities as to each other. There was clearly an intent to make *some* distinction between accommodation indorsers and ordinary indorsers. Under our law, as it has stood

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since 1826, there was no distinction—see 1 Kelly, 205—nor was there any distinction at common law. What other distinction is there than this, that they are to be liable to contribution? Our act of 1826 provided that *all indorsers* of notes not payable at bank were to be treated as securities. This Court, however, held, in 1st Kelly, 205, that this only meant that they were not entitled to notice, and might be sued in the same action as the principal. The Code leaves out this *general language* of the Act of 1826, though it provides that indorsers of notes not intended to be negotiated at a bank are not entitled to notice, and may be sued with the principal: sections 2739 and 2740. But as to accommodation indorsers it provides that they are *securities merely*.

We can see no other motive for this language and for the provision in section 2738, as to ordinary indorsements, except to change the rule at common law and as it previously stood in this State, by making them liable to contribution. In every other respect but this, an ordinary indorser is a security only. This is the meaning of the ordinary contract of indorsement—the form of it—and the section under consideration says, notwithstanding the form, an accommodation indorser is treated as a surety merely. And this is, in our judgment, an eminently just and proper change of the law. As the common law was, the presumption of law, to-wit: that the indorser had transferred the note to the transferee for value, was directly contrary to the truth of the case when the indorser was only an accommodation indorser, and it required a very refined and subtle line of reasoning to sustain the liability of a prior accommodation indorser to a subsequent one, on principle, since the want of consideration between them was apparent. See 1st Kelly, 205.

The law of the Code is, therefore, just. The indorsers are in fact securities for the maker. That, in this case, is the truth of the matter, whatever the form may be. That was the motive of each for signing, and it is nothing but carrying out the real meaning of the signing to hold that even as be-

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tween themselves they are securities merely for the maker, and liable to contribution as between each other.

Judgment affirmed.

E. E. RAWSON, plaintiff in error, vs. MARCUS A. BELL, defendant in error.

1. The bill of exceptions should specify the portion of the charge to which exception is taken. (R.)
2. The building of a party wall by the plaintiff, under a parol agreement with the defendant that he would pay for one-half of as much of the wall as he used, when he built, is such a part performance of the contract as takes it out of the Statute of Frauds. (R.)
3. If a parol agreement, in relation to the building of a party wall, has been fully executed by both parties, it creates an easement which attaches to and runs with the land. (R.)
4. Where the defendant, having contracted with the plaintiff to pay for so much of a party wall as he used when he built, conveys his lot to a third person, having thus put it out of his power to build, he becomes liable to the plaintiff. (R.)
5. As no time was specified within which the defendant was to build and pay the plaintiff for one-half of the wall to be used by him, the law will imply that it was to be done within a reasonable time. (R.)

Practice in Supreme Court. Exception to charge. Party wall. Statute of Frauds. Part performance. Easement. Reasonable time. Before Judge HOPKINS. Fulton Superior Court. October Term, 1871.

For the facts of this case, see the decision.

D. F. & W. R. HAMMOND, for plaintiff in error, submitted the following brief:

We contend that the Court should have charged the jury that, "if they should find that Rawson, at the time he sold to Angier, gave him notice of his promise to pay for half the wall when he used it, and also notified him that he never expected to pay for the wall, as he would never use it, that then

Rawson would not be liable, and it was their duty to find for defendant;” and “if they should find that Bell sold and conveyed his lot, together with the appurtenances, before the bringing of this suit, that then Bell would have no right of action, and it would be their duty to find for defendant.”

I. A parol agreement to pay for half a party wall when used, binds the land, where the purchaser took with notice: *Wickersham vs. Orr*, 9th Iowa, 253. A covenant to pay for half a party wall when used, “binds, and is a charge upon the land:” *Wash. Eas. and Serv.*, side p. 459; 1st *Bradford’s N. Y. Rep.*, p. 52. A claim for contribution for building a party wall, is a lien upon the land: *Campbell vs. Mesier*, 6th *Johns. Ch. Rep.*, 23. This parol agreement has the same force and effect as a covenant, since it has been performed on one side, and therefore may be treated as a covenant: see *Sheppard’s Touch*. A covenant runs with the land “when there is a privity of estate between the covenanting parties, and the covenant is connected with and concerns the subject-matter of the privity of the estate between them:” *Morse vs. Aldrich*, 19th *Pick.*, 449; *Hurd vs. Curtis*, *Ibid.*, 459; *Sheppard’s Touch.*, side p. 176, 316. In this case, the privity of estate between Rawson and Bell was in the eight inches of Rawson’s land on which the wall stood. Rawson owned the fee and Bell had an easement in it for the support of his wall. The agreement was “to pay when he used the wall,” and was directly connected with and concerning the subject-matter of the privity of estate between Bell and Rawson.

II. Bell passed his right of action by his deed to Angier. The effect of the agreement was that the entire wall remained the property of Bell, until used and paid for by Rawson. By the deed the wall passed, and with it the right to be paid for it: *Burlock vs. Peck*, 2d *Dun.*, 90; *Wash. Eas. and Serv.*, side p. 464; *Clinton’s Dig. N. Y. Rep.*, vol. 3, p. 2453; 1st *Bradford’s N. Y. Rep.*, p. 57. Improvements placed upon the land of another may, by agreement, remain the property of him who placed them there: 1st *Hill*, 176; 4th *Mass.*,

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514; 8th Metc., 34; 5th Pick., 487. This principle is recognized by the laws in reference to the city of Savannah: Code, sec. 4792.

III. This agreement was by parol, and the performance, on the part of Bell, was not sufficient to take the case out of the Statute of Frauds: 3d Pars. on Cont., p. 60.

L. E. BLECKLEY, for defendant, submitted the following brief:

The contract was personal between these parties. Bell performed his part fully, and gave credit to Rawson, and trusted to Rawson's personal responsibility. The latter contemplated building himself, and Bell treated with him on that understanding. Neither party stipulated for or against his assigns. The subsequent conveyance to Angier neither divested Bell of his right nor relieved Rawson of his obligation: 28th Ind. R., 37; 17th Pick., 538; 24th Wis., 461.

Rawson had already planned the building in some respects at least, that he was going to erect. He virtually agreed to use a portion of the wall, and he expressly promised to pay when *he* used it. As no time was specified, he must be understood as intending to build in a reasonable time: 11th Ga. R., 154.

Instead of acting as he had induced Bell to believe he was going to act, he changed his purpose and sold out to Angier. He thus put it out of his power to build at all, and that was a virtual breach of his undertaking: Langdell's Select Cases, 917, 947; 12th Ga. R., 150; 15th Mees & W., 189; 16th Mass., 161.

WARNER, Chief Justice.

The plaintiff brought his action against the defendant to recover the one-half of the cost or value of the erection of a party-wall under an alleged agreement between the parties, who were the owners of adjoining city lots in the city of Atlanta. On the trial of the case the jury, under the charge

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of the Court, found a verdict for the plaintiff for the sum of \$336, with interest and costs. The case comes before this Court on exception to the entire charge of the Court to the jury, without assigning error to any particular part thereof. As there was no motion made to dismiss on that ground, we will consider the charge of the Court as it is set forth in the record, without intending to indorse or sanction such a practice in this Court. The following facts were disclosed by the evidence on the trial:

Bell, the plaintiff, owned the city lot described in the declaration, and Rawson, the defendant, owned the adjoining lot. Bell desired to build, and proposed to Rawson to erect the dividing wall between their two lots so as to place one-half thereof on Rawson's land. Rawson agreed to it, at the same time agreeing to pay for one-half of as much of the wall as he used in building himself when he built, and also specifying that he would not want to erect as high a house as Bell contemplated, but would only want to build a two-story house without any basement or cellar. This agreement was by parol. Bell proceeded to build, and placed the dividing wall half on his own and half on Rawson's land, according to the agreement. The wall was sixty feet long and sixteen inches thick, eight inches of it being on Rawson's land. After its completion, to-wit: on the 20th day of December, 1866, Bell sold his lot, together with the appurtenances, executing a regular warrantee deed for the same to N. L. Angier. Afterward, to-wit: on the 10th day of January, 1867, Rawson sold his lot to the same Angier, together with the appurtenances, executing also a regular warrantee deed for the same. Angier testified that when he bought from Bell nothing was said in relation to the party wall or the claim against Rawson for the share of its cost, but when he bought of Rawson the subject was mentioned by Rawson, who stated to him the agreement between him and Bell, and also stated that as he (Rawson) would never build, he supposed that he (Rawson) would never have anything to pay

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for the wall. Angier replied that that was a matter with which he had nothing to do, and rested between him (Rawson) and Bell, he supposed. He also testified that he gave Rawson more for his lot by reason of said wall than he otherwise would have given him. When Bell heard of the sale by Rawson he applied to him for his pay, which was refused. Brick work was worth as much as \$12 per thousand, and there were twenty brick to the cubic foot. The Court charged the jury that "if they should find that there was a parol contract between Bell and Rawson under which Rawson had agreed to pay for a part of the wall which Bell built on the line between their lots when he built to said wall, and Bell had gone on in good faith and completed his house according to said contract and placed half the wall on Rawson's land, and then sold and conveyed his lot, together with the appurtenances to the same or any other person, and thereby placed it beyond his power to build to the wall, that then Rawson became liable to Bell for whatever portion of the wall he had agreed to pay for when he built in the same manner as if he had constructed his house and used the said wall; and this would be true although you should find that such third party purchased from Rawson with notice of the existence of the contract between Rawson and Bell."

Two questions are made by defendant: First, that this was a parol contract for the sale of land, and is therefore void under the Statute of Frauds. Second, if it is not void on the ground of part performance of the parol agreement by the plaintiff, then it is an agreement in the nature of a covenant, which attaches to and runs with the land, and that the plaintiff's remedy is against the defendant's grantee, or those claiming under him, who should build on the lot and use the wall, and not against the defendant, who did not build on the lot prior to his alienation of the same. As to the first question, the building of the party wall by the plaintiff, under the parol license and agreement of the defendant, was such a part performance as takes it out of the operation of the Statute of

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Frauds: Code, 1941. If the parol agreement had been fully executed by both the parties to it in relation to the erection of the party wall, it would have created an easement which would have attached to and run with the land, and such would have been the legal effect of the agreement when fully executed by the parties to it. The fundamental error in the argument of the defendant is in the assumption that the agreement has been fully executed on his part, whereas this suit is brought to compel him to perform his part of it. The agreement was, that the plaintiff would build the party wall between their two lots, one-half thereof to be on the plaintiff's lot, and the other half on the defendant's lot, the defendant agreeing to pay for one-half of so much of the wall as he used in building himself when he built, specifying that he would not want to erect as high a house as the plaintiff contemplated, but would only want to build a two-story house without any basement or cellar. The evidence clearly shows that both parties, at the time of making the agreement, contemplated building on their respective lots, and the agreement was made in view of that fact. The plaintiff did build; in other words, performed his part of his agreement. The defendant did not build on his lot, as was contemplated by the contracting parties, but sold his lot to Angier, and stated to him the agreement between the plaintiff and himself, and thereby received more for his lot than he otherwise would have done, in consequence of the wall having been built there by the plaintiff under that agreement. It is true, there was no definite time specified in the agreement when the defendant should build on his lot, and pay the plaintiff for one-half of the wall used by him in the erection of his building, but he has now put it out of his power to build on the lot by conveying the property, and with the increase of price in his pocket, realized from the sale of his lot by reason of the wall having been built by the plaintiff under the agreement, coolly tells the plaintiff that he must look to his grantee or some other person when they shall build on the lot and use the wall, assuming

that he has complied with his agreement with the plaintiff so far as he was legally bound to do, and that his agreement was in the nature of a covenant running with the land, thereby shifting his liability under his agreement with the plaintiff to his grantee of the lot, after having received the increased price from him in the sale of the property.

An executed agreement which will constitute an easement attached to and running with the land, is one thing. Whether such an agreement has been executed on the part of both the parties to it, is another and quite a different thing. The question in this case is, not what would have been the legal effect of this agreement upon the land, if it had been executed and performed according to the true intent and meaning thereof as understood by the parties thereto; but the question is, whether that agreement has been executed and performed by the defendant to the plaintiff, as the same was understood by the plaintiff, and known by the defendant to be so understood by him at the time it was made.

As no time was specified within which the defendant was to build and pay the plaintiff for one-half of the wall to be used by him, the law will imply that it was to be done within a *reasonable* time, and the defendant having put it out of his power to comply with his agreement with the plaintiff by conveying the property to another, the plaintiff's right of action accrued to him. Although we should have been better satisfied with the charge of the Court if it had clearly called the attention of the jury to the distinction between an executed agreement of the parties which would have created an easement attaching to and running with the land, and an agreement which had not been executed and performed by one of the parties to it, still there was sufficient evidence in the record to authorize the charge as given, and the verdict being right under the evidence and the law applicable thereto, we will not disturb it.

Let the judgment of the Court below be affirmed.

Scarborough *vs.* The State of Georgia.

MALTA SCARBOROUGH, plaintiff in error, *vs.* THE STATE OF GEORGIA, defendant in error.

1. On the trial of an indictment for keeping a lewd house, under section 4462 of the Code, it is not necessary to show that the master of the house kept the same for profit. It is sufficient if it appear that the lewdness carried on was with his permission or in his presence without his dissent.
2. A man is guilty of keeping a lewd house within the meaning of section 4462 of the Code, if open and notorious lewdness is practiced therein by his wife and daughters, in his presence, with his consent or without his dissent.
3. It is not an expression of opinion by the Judge, as to what has been proven on the trial of an indictment for keeping a lewd house, to say to the defendant's attorney, (who is addressing the Court upon the law of the case,) in reply to the claim of the attorney, that there must be proof that the defendant kept the house for profit: "It makes no difference whether he keeps it for profit or pleasure, he is guilty."
4. When the State's counsel in a criminal case, in addressing a jury, is making statements not in proof, and one of the defendant's counsel objects, but another says let him go on, it is not a ground for new trial, if the Judge fail to interfere until the matter is again insisted upon by the defendant's counsel; nor will the verdict be set aside because the Judge in his charge fails to say to the jury that they are not to notice such statements, there being no request for such a charge.

Criminal law. Keeping a lewd house. Opinion on evidence. Argument of counsel. Before Judge CLARK. Sumter Superior Court, April Term, 1872.

Malta Scarborough was tried upon the following indictment:

"GEORGIA—SUMTER COUNTY.

"The grand jurors, sworn, chosen and selected for the county of Sumter, to-wit: * * * In the name and behalf of the citizens of Georgia, charge and accuse Malta Scarborough and Harriet Scarborough, of the county and State aforesaid, with the offense of keeping a lewd house; for that the said Malta Scarborough and Harriet Scarborough, on March 20th, 1872, in the county aforesaid, did then and there, un-

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lawfully, by themselves and by others, maintain and keep a lewd house, or a place for the practice of fornication or adultery, or fornication and adultery, contrary to the laws of said State, the good order, peace and dignity thereof."

The defendant demurred to the indictment upon the following grounds, to-wit :

1st. Because two offenses are therein charged and joined.

2d. Because the "others" charged with keeping and maintaining a lewd house for defendant are not specified.

The demurrer was overruled, and defendant pleaded not guilty.

It appeared from the evidence that defendant, his wife and daughters resided together in the county of Sumter ; that the girls and young men had been seen going to the bushes together ; that a man and one of the girls had been seen in bed together in defendant's house covered up, while defendant was in the same room with them ; that the man was not related to the family ; that he remained in bed with defendant's daughter from an hour to an hour and a half ; that defendant had three grown daughters and one not quite grown ; that the man who was in bed with the girl was drunk ; that defendant's wife had been seen going to the bushes with men, and had been heard engaging in improper conversation ; that in May or June, 1870, one of the girls had been seen in the kitchen with a man on top of her ; that all kinds of vulgar conversation was carried on in the house in the presence of defendant ; that men and women had been seen on the bed together with their arms around each other ; that defendant was a laborer and at work away from home a great deal ; that the girls had been seen quilting for a livelihood ; that upon one occasion defendant had been heard to direct men to leave as it was bed time ; that one of the girls had a baby ; that she had been married but her husband left her ; that defendant had been heard to order drunken men away from his house unless they would behave

themselves; that men visited the house at all hours of the day and night.

The jury returned a verdict of "guilty," and defendant moved for a new trial, upon the following grounds, to-wit: 1st. Because the Court erred in overruling the demurrer to the indictment. 2d. Because the verdict is contrary to law and the weight of evidence. 3d. Because the Court erred in overruling all objections to proof of facts not transpiring in the presence of defendant. 4th. Because the Court refused to allow the defendant to show that his wife controlled the household, whether he was present or absent. 5th. Because the Court erred in interrupting defendant's counsel when arguing before the Court and the jury on the law as to what constitutes the keeping and maintaining a lewd house, in the presence and hearing of the jury, with the question, "What difference does it make whether he is keeping it for pleasure or profit, but he is guilty in either case?"—thus intimating in a decided and unmistakable manner to the jury that, in the Court's opinion, the charge had been proven; the argument of the counsel, thus replied to, being, that to sustain the charge, it was necessary for the prosecution to show that the defendant, for profit and as a matter of business, kept and maintained a house of ill-fame. 6th. Because the Court erred in permitting counsel for the State, in his concluding argument, over the objection of counsel for defendant, to comment upon facts not in evidence, and in failing to instruct the jury as to the weight to be attached to these remarks. 7th. Because the Court refused to charge the jury as requested, to-wit: "It is incumbent upon the State to show that the defendant carried on the lewdness as a business, or at least, that he in some way instigated or participated in these criminal transactions. The evidence must show that defendant kept and maintained the house as a lewd house. If you believe that these women engaged in these criminal exercises for the gratification of animal passions, and not as a business, although defendant may have been aware of their conduct, he is not

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guilty of the keeping and maintaining a lewd house; the women may be guilty of adultery and fornication, or adultery, or fornication." 8th. Because, when the Court charged the jury upon the request of defendant's counsel, to-wit: "If the evidence does not show to your minds, beyond a reasonable doubt, that defendant connived at the acts of lewdness, it is your duty to acquit him. The fact that a man is the head of a family, or the proprietor of a house, does not constitute him the master of a lewd house, although the lewdness may be carried on in said house. He must exercise some degree of control in the matter, over the parties guilty of the lewdness;" the Court erred in adding the following sentence, to-wit: "Permitting lewdness in his house, among his daughters, is such consent." 9th. Because, when the Court charged the above written request, the Court erred in remarking to the jury, "I charge you this, subject to whatever modifications are contained in my general charge," and in failing then to state, or at any subsequent time, the special and particular modifications meant, and in thus not giving the said request in charge to the jury clearly, properly and fairly, as the law requires. 10th. Because the Court erred in its general charge.

To the fifth ground the Court adds the following note: "I gave no intimation to the jury of my opinion of the case. The counsel for defendant was addressing the Court on a question of law, and was reading from Wharton's Criminal Law upon the necessity of proving that the defendant (quoting from the book) kept the house for profit, when the Court put to counsel the inquiry, and then referred to the Code as changing the common law. The Court, at the time, made no allusion to this defendant, and was replying solely and entirely to argument of counsel, and is confident that the jury, counsel and spectators so understood him." To the sixth ground the Court adds the following note: "The Court was at the time engaged in preparing its charge, and does not remember any of the facts stated, except that counsel for the State said that 'he was retained to break up this nest.' I

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presume, of course, that the remarks of the counsel for the State are correctly reported. One of defendant's counsel objected to remarks of counsel for the State, and the other counsel for defendant remarked: 'Let him go on.' I supposed at once that all objections were waived. In a few moments counsel for defendant again called my attention to the remarks as illegal and improper, when I promptly interposed." To the ninth ground the Court adds the following note: "The modifications alluded to were given, if any, in my written charge, which followed immediately the reading of the request to charge. I should regret to know that I had not charged the law clearly, properly and fairly. I am fully satisfied the jury and counsel 'clearly' understood me, and, whether fair or not, it speaks for itself."

The Court charged the jury as follows, to-wit:

"The permitting others to commit acts of adultery or fornication in the dwelling house of the owner, with the owner's daughter, makes him guilty of keeping a lewd house. It is not necessary for the State to show that the lewd house was kept for purposes of profit; it will be sufficient to show that such a house was kept, no matter what the object of the owner is in keeping it. In passing upon this case, you will look into all the facts, and inquire whether or not the facts as detailed by the witnesses are consistent with any other theory than that of keeping a lewd house. It is not necessary, before you can convict defendant, that it must appear that defendant lived off of the profits of prostitution, and got other women as inmates beside the members of his own family. If he had three or four daughters and a wife, who were lewd in their habits and carried on their lewd practice in his house and with his connivance or permission, he is no less the keeper of a lewd house because he sets up shop with the members of his own family. If you believe, from the evidence, that the defendant was the proprietor of the house; that he had three or four daughters; that crowds of young men were in the habit of visiting the house at all hours of the night; that

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indecent and vulgar conversation was had in the house in the presence of the inmates; that one of the daughters and a man were covered up together in a bed; that acts of fornication were committed publicly in the kitchen between a man and one of the women; that the young men who assembled at the house took indecent liberties with the women, and walked together, either hand in hand or with arms around each other's waists, to the woods, for purposes of sexual intercourse; and did actually indulge in such intercourse; and that these things occurred frequently, and in the presence of the defendant, or with his knowledge, then they are such as to raise a strong and even violent presumption of guilt, and would justify you in finding a verdict of guilty."

The Court overruled the motion for a new trial, and plaintiff in error excepted, assigning error upon each of the grounds of said motion.

C. T. GOODE; FORT & HOLLIS; JOHN D. CARTER, for plaintiff in error.

C. F. CRISP, Solicitor General, represented by CHARLES HUDSON, for the State.

McCAY, Judge.

Assuming what seems incontestible from the proof, that the house of the defendant was a place for the *practice* of fornication and adultery, we think it would be adding to the statute an element that it does not contain to say that to constitute the offense, it must be shown that the house was kept for *profit*. This is not a common law offense, nor does its definition depend upon the common law definition of a lewd house. The Code defines the meaning: "or house for the practice of fornication or adultery, by himself, herself or others." Any one guilty of maintaining or keeping such a house is punishable under this section of the Code: section 4462. We

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do not see that the evil is any way increased or lessened by the additional fact that a profit is made of the business. The evil consists in the moral guilt of conniving at and encouraging such practices, and in the scandal and outrage upon the decency and virtue of the community; and if one keeps such a house merely for the gratification of his own vicious propensities, himself and his house are and ought to be just as much a nuisance and a stench in the nostrils of a community as though it were for a profit.

Besides this, if it were necessary to show it was kept for profit, the difficulty of making the fact apparent, would almost produce an immunity for the crime. We think there was no error in the Judge's charge on this point.

Nor can it make any difference that their practices were carried on by the wife and daughters of the defendant. The statute is by himself, herself or "others." Indeed it would seem to aggravate the offense that the perpetrators are those over whom the defendant has the right of a husband or parent. We do not say that a parent or a husband is to be charged with every act of his wife or child. But it is only holding him to the performance of an ordinary duty of a good citizen to say that he is responsible if he suffers them to make his house notorious for open lewdness—a resort for the vicious, where they may with impunity, so far as he is concerned, practice fornication and adultery.

The proof contained in this record shows that he did not interfere—that with a full opportunity to know what was going on, he kept still. He did not, it is true, take any active part. But his was the house—he was master therein, and his presence and want of dissent is sufficient. It may be that he was a mere tool in the hands of others. If so, that should have been proven. All this was for the jury, and it was fairly left to them. Indeed, this is true of the character of the house, the position of Scarborough in reference to his wife, his power over them, his assent or dissent, etc. *Prima facie* the owner of a house, the husband and father of

the inmates, is the head of the family, and can control what is done there. If he permits it, with his knowledge, to be degraded into a brothel and nuisance, *prima facie* the law holds him responsible, no matter who are the actors. If he be an imbecile—a mere tool—that unnatural thing who can be made by a vicious wife and daughters submit to his own dishonor and to the degradation of his family—he ought to be held to proof of it. The act is so unnatural, so debasing and disgraceful, that the proof of his want of manhood ought to be strong. We think the jury was right. This was a bad house—a nuisance—a disgrace to all concerned in it, and a violation of the law.

It would be impossible to carry on a trial if this section of the Code, prohibiting a Judge from expressing any opinion as to what is proven, is to be construed as is contended for. A Judge, in deciding as to admissibility of testimony, must always, to some extent, decide as to its weight, since often its admissibility depends on that, so he must often determine what has been proven so as to say whether certain other things may be proven. To decide a non-suit, he must decide if there be enough proven to justify a verdict, etc.

The only practicable rule is, to treat the jury as possessed of common sense, and as capable of understanding what is addressed by the Judge to them and what is not. He may not express to the jury any opinion; but if in the decision of any legal question, as it arises, he must pass upon facts, the statute does not apply. It must be reasonably construed. In this view of the law, we see no error in the remark of the Judge. He only said to the counsel what was his view of the law, and this he had a right to do.

We are not in the habit of scanning with great nicety the mode in which a Judge permits a case to be presented to the jury. We do not say he may not be so lax in his rules as to be guilty of error; but we are satisfied that a reviewing Court is not in a position to be a very proper judge of this thing. It is improper to permit statements to be made that

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are not in proof, and the Judge ought not, even with the consent of both parties, to allow it, unless it be as proof. But it seems here to have been at first consented to; one of the counsel said, "Let him go on." When appealed to, the Court stopped it.

The complaint is that the Judge did not tell the jury not to notice these statements. It seems to me that this is an after-thought. Had there been any fear of its effect on the jury, it would have been easy to ask the Court to instruct the jury as to their duty in this respect. But it is giving a very humble part to the jury on a trial to suppose them capable of giving weight to statements of this character. We think the statements ought not to have been allowed by the Judge, but in so strong a case as this, we do not think there ought for this reason to be a new trial.

Judgment affirmed.

CHARLES A. NUTTING *et al.*, plaintiffs in error, vs. OSCAR THOMASON *et al.*, defendants in error.

1. When an administrator sells railroad stock, the property of the estate which he represents, at private sale, and his vendee sells to a *bona fide* purchaser without notice, the title of such purchaser will be protected, as against the heirs of said estate. (R.)
2. If the original purchasers of this stock bought it from the administrator at private sale, under such circumstances as the law will charge them with notice, and have either appropriated it to their own use or sold it to others, then they are liable to the heirs for a conversion of it, such purchase being a fraud upon their rights. (R.)
3. In the absence of any fraud or collusion on the part of the railroad company, the mere transfer of the stock on the books thereof to the purchaser, by direction of the administrator, will not make the company liable as a guarantor or warrantor of the vendor's title to the stock. (R.)

Private sale by administrator. Railroad stock. *Bona fide* purchaser. Before Judge COLE. Bibb Superior Court. October Adjourned Term, 1871.

For the facts of this case, see the decision.

NISBETS & JACKSON; A. O. BACON, for plaintiffs in error.

WHITTLE & GUSTIN; LYON & IRVIN; W. K. DEGRAFFENREID; B. & W. B. HILL; JACKSON, LAWTON & BASINGER, for defendants, submitted the following brief: 1st. No title, either legal or equitable, passed by the sales by Usher, and the sales were absolute nullities: Code, secs. 2513, 2514; *Worthy vs. Johnson*, 8 Ga., 236; 10 Ga., 358; *Wyman vs. Campbell*, 6 Porter, (Ala.,) 219; *Neal vs. Patten*, 40 Ga., 365; *Southwestern R. R. Co. vs. Thomason*, 40 Ga., 408. 2d. Code, sec. 2303, only applies when legal title passes by sale: *Daniel vs. Hollinshead*, 16 Ga., 190. 3d. The purchasers in this case had actual notice by the transfer; they claim title by the transfer alone: Charter of S. W. R. R., sec. 10; Acts of 1845, p. 136. As to what is notice: *Jordan vs. Pollock*, 14 Ga., 145. 4th. The title to the personal estate only vested in Usher as administrator, and not as distributee: Code, sec. 2447. He was indebted to the estate at the time of these sales more than his interest in it, and could therefore convey no interest in it to another. 5th. Defendant Nutting is liable for value of stock and dividends. He has wrongfully obtained possession of the property of the estate of Wakeman, and disposed of it in such a manner that it cannot be traced, and has received the proceeds. He cannot, in equity, hold these proceeds against the distributees of the estate: Code, secs. 2307, 3094, 3095; *Rogers vs. Fort*, 19 Ga., 94. 6th. Under the facts of this case, the purchasers of the stock were joint wrong-doers with Usher, and their equity is inferior to that of the sureties on his bond, who are innocent: *Nutting vs. Boardman*, (July Term, 1871,) 43 Ga., 598. There is no question of superior and inferior equity as between them and complainants, who have a strict legal right. 7th. This Court has already decided the Southwestern Railroad Company not liable to complainants for the stock, even

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if the transfers were fraudulent : Southwestern R. R. Co. v. Thomason, 40 Ga., 408. If any fraud the purchasers participated, and will not be relieved in equity : Code, sec. 308. Certainly, innocent parties will not be delayed to settle equities among wrong-doers. 8th. No one is injured by the failure of the Court to charge as to verdict against Usher, being shown to be insolvent, and no verdict could have been rendered by which the purchaser would be benefited. applied for by counsel for Nutting and others, a decree could have been rendered by the Chancellor upon the order taking the bill *pro confesso* and the decretal verdict : Code, sec. 4147, 4153, 4154. 9th. In this case a new trial should not be granted, even if the decree below is wrong. The case fully before the Supreme Court upon the facts, and all parties represented, and it ought to be finally disposed of: Code, sec. 4219.

WARNER, Chief Justice.

The complainants filed their bill against the defendants to recover forty shares of stock in the Southwestern Railroad Company, which had been sold by the administrator Wakeman at private sale. On the trial of the case, as it appears from the evidence in the record, it was proved that, on the 28th December, 1865, Usher, the administrator of Wakeman, sold and transferred to Nutting twenty-five shares of the stock at private sale; that on the 21st of March, 1866, Usher, the administrator, sold and transferred to Cubbedge, Caldwell & Company fifteen shares of the stock at private sale, the transfer of stock in each case being signed by Usher as administrator of Wakeman. On the 21st March 1866, Cubbedge, Caldwell & Company sold and transferred the fifteen shares purchased by them to J. S. Pope, and on the 5th day of September, 1866, Pope sold and transferred the same fifteen shares of stock to James Stinson. The twenty-five shares of stock purchased by Nutting were not traced into the hands of any particular person as to

holder thereof, but Nutting had long since disposed of it. The Court charged the jury, "that the Supreme Court have decided that the sale of the stock by Usher was utterly null and void, and conveyed no title to the purchasers. The Supreme Court have also decided that the company is not responsible to the heirs, but that the purchasers of the stock are. I charge you, that if Nutting, and Cubbedge & Hazlehurst purchased this stock from Usher at private sale, they got no title, and are liable to these complainants for the value of the stock and the dividends they have received on the same. If Nutting, and Cubbedge & Hazlehurst have disposed of this stock, and can trace it into the hands of others, they will not be liable; if they cannot trace it, they are themselves still liable."

The jury found a verdict against Nutting for the value of the twenty-five shares of stock purchased by him, and for the dividends received by him thereon, with interest on said dividends from 1st March, 1866. The jury found a verdict against Stinson for the value of the fifteen shares of stock purchased by him, which he might discharge by the delivery of the stock, with all dividends received thereon; and also found against him \$412.50 for dividends received by him on the stock, with interest on said dividends from the 15th July, 1868. The defendants made a motion for a new trial, on the ground of error in the charge of the Court to the jury, and for refusing to charge as requested, as set forth in the record, and because the verdict was contrary to law and evidence, which motion was overruled, and the defendants excepted.

In view of the facts of this case, as disclosed in the record, we think the charge of the Court to the jury was error, especially in regard to the liability of Stinson, who appears to have been a *bona fide* purchaser for the value of fifteen shares of stock from Pope, without notice of fraud in the sale of the stock by Usher, the administrator to Cubbedge, Caldwell & Company. When this case was before this Court at a former term, on a demurrer to the complainant's bill, this

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Court decided that the complainants had the right to maintain their suit against the defendants upon the allegations made in their bill; that the sale of the stock made by the administrator should have been made under the law at public sale; that the railroad company was not liable for allowing the transfer of the stock to be made by the administrator of Wakeman on the books of the company; that, in view of the facts of the case, the company should be made a party, and also that the holders of the stock should be made parties when discovered. This Court did not decide, and could not have decided, that the sale of the stock was utterly null and void, and conveyed no title, especially as to *bona fide* purchasers, who were not then before the Court, and there is nothing in the reported judgment of this Court to authorize such a conclusion: *Southwestern R. R. Co. vs. Thomason*, 40th Ga Rep., 408. The 2514th section of the Code declares that all sales by administrators, (except of annual crops sent off to market and of vacant lands,) shall be at public outcry, between the hours of ten o'clock A. M. and four o'clock P. M., but this section of the Code does not declare that a sale made in any other manner *shall be void*.

The decisions made by this Court, before the adoption of the Code, in relation to administrator's sales of land and negroes, went upon the ground that there must be a judgment of the Court of Ordinary granting leave to sell that specific kind of property before the title could be divested. There was no order of the Ordinary required under the provisions of the Code for leave to sell this stock by the administrator; but he was required to sell it at public sale. Now, the question is, if the administrator of the estate does collude with the purchaser of the stock, and sells it to him at private sale, and such purchaser of the stock at private sale afterwards sells it to a *bona fide* purchaser for value, without notice that it was purchased of the administrator at private sale in fraud of the rights of the parties interested therein, will such *bona fide* purchaser of the stock be protected in a Court of equity?

This is an important question to the purchasers of stock in railroad companies. It was said on the argument of this case, that the *bona fide* purchaser of the stock stood in no better condition than the *bona fide* purchaser of stolen property; that inasmuch as the thief had no title to the property stolen, those who purchased it from him, or derived title under or through him, acquired no better title than he had, and he having none, the *bona fide* purchaser would acquire none. The thief who steals the property of another, has no right or claim to it, either under *color of title* or otherwise. Is that a parallel case to the one made in the record now before us? There can be no dispute that the legal title to this stock was in Usher, the administrator of Wakeman. It is true that he held the legal title to the stock in trust for the benefit of the heirs and creditors of his intestate: Code, 2447. In violation of his duty, as such trustee, he conveyed the legal title to the purchaser at a private sale of the stock in fraud of the law, which required him to sell it at public sale, and in fraud of the legal rights of his *cestui que trusts*, that it should be so sold; and, as between him and the purchaser, the sale was not absolutely void, but voidable at the election of the parties interested in that sale, in the same manner as a private sale of land by an administrator under an obligation to perfect the title by legal formality: Code, 2525.

As between the original parties to the sale and purchase of this stock, it was optional with the complainants whether they would ratify it or set it aside, on account of the fraud in the sale of it, as between the administrator and the purchasers thereof from him. The purchasers from the administrator of the stock, under the facts disclosed in this record, were not innocent purchasers without notice. The certificates of the transfer of the stock to them on the books of the company, was signed by Usher, as the administrator of Wakeman, and if they thought proper to trust to Usher, as their agent to make the transfer and bring them scrip for the stock in their own names, without looking into his title thereto, it was their

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own fault and negligence, for which the law will hold them responsible. If the original purchasers of this stock purchased it from the administrator at private sale, with actual knowledge that it was the property of his intestate, or under such circumstances as the law will charge them with notice, and have either appropriated it to their own use or sold it to others, then they are liable to the complainants for a *conversion* of it, such purchase being a fraud upon their rights.

A title obtained by fraud, though voidable in the vendee will be protected in a *bona fide* purchaser without notice : Code 2598. Stinson purchased the fifteen shares of stock from Pope, to whom Cubbedge, Caldwell & Company, the original purchasers from Usher, had sold it. It appears from the evidence in the record, that Stinson was a *bona fide* purchaser of the fifteen shares of stock, for value, without notice of fraud in the sale thereof between Usher, the administrator, and Cubbedge, Caldwell & Company, and, as such *bona fide* purchaser is entitled to be protected in his title thereto, and the Court should have so instructed the jury in its charge upon that question made in the case.

In the absence of any fraud or collusion on the part of the company, the mere transfer of the stock on the books thereof by the direction of the administrator to the purchaser of the stock, will not make the company liable as a guarantor or warrantor of the vendor's title to the stock. The purchaser of the stock must look to him from whom he purchased it *Central R. R. and B. Co. vs. Ward et al.*, 37 Ga. Rep., 531

In our judgment, the Court below should have granted a new trial for error in the charge of the Court to the jury, and on the ground that the verdict was contrary to the law and the evidence, so far as the defendant, Stinson, is concerned.

Let the judgment of the Court below be reversed, and a new trial granted.

Witkowski vs. Skalowski.

E. WITKOWSKI, plaintiff in error vs. B. SKALOWSKI, defendant in error.

A *certiorari* does not lie, to correct the errors of a Justice of the Peace, in a judgment involving questions of fact, when the amount of the judgment is over fifty dollars. In such cases the remedy is by appeal, as provided by the Constitution of 1868.

Certiorari to Justice Court. Before Judge COLE. Bibb Superior Court. May Term, 1872.

E. Witkowski sued out a writ of *certiorari* to the Justice Court of the 716th district, Georgia Militia. When said cause was called in the Superior Court, counsel for B. Skalowski moved to dismiss the same, upon the ground that the sum involved in the original suit in the Justice Court exceeded \$50, and that therefore the remedy of the dissatisfied party was by appeal, and not by *certiorari*. The Court sustained the motion, and plaintiff in error excepted, and assigns said ruling as error.

POE, HALL & POE; NISBETS & JACKSON, for plaintiff in error.

A. O. BACON, for defendant.

McCAY, Judge.

The Constitution, Article V, section 3, paragraph 2, does provide that the Superior Court shall have power to correct the errors of Inferior Courts by writ of *certiorari*. But it also provides, Article V, section 6, paragraph 2, that whilst a Justice of the Peace shall have jurisdiction of amounts under one hundred dollars, there shall be an appeal from his judgments to the Superior Court when the amount claimed is over fifty dollars. It is hardly to be supposed that it was intended to give the right of *certiorari* and of appeal in the same class of cases. As the word appeal has for a long time been used in Georgia it has been understood to relate only

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to matters of fact—it involves trial of questions turning upon evidence, and almost necessarily presupposes the new tribunal to be a jury. Under our previous system the Justice's Court had a jury, and there was always an appeal from the Justice to the jury. The Constitution of 1868 dispenses with a jury in a Justice's Court, and increases his jurisdiction to one hundred dollars, but provides that when the amount claimed is over fifty dollars there may be an appeal to the Superior Court.

As we understand this provision it guarantees the right of trial by jury in cases of over fifty dollars if the case turns on matters of fact. This trial cannot be had by *certiorari*, since on such a writ the review is entirely upon the Judge and is a correction only of errors of law. We think this case stands precisely on the footing of the judgment of an Ordinary on the probate of a will. The Constitution of this State has, for many years, provided for an appeal from the Probate Court; and it has also, for many years, had this same provision as to the power of the Superior Court to correct errors by *certiorari*. The uniform construction of these two provisions has been that when the question involved matters of fact appeal was the only remedy.

We apply this same rule to this question. If the decision be one purely of law, the party may adopt the writ of *certiorari*. If questions of fact be also involved the remedy must be by appeal. We think in this way, and in this way only, can the right of trial by jury be preserved, as it was clearly the intent of the Constitution to preserve it in cases where the amount claimed is over fifty dollars.

Judgment affirmed.

THE SOUTHWESTERN RAILROAD COMPANY *et al.*, plaintiffs
in error, *vs.* THE SOUTHERN AND ATLANTIC TELEGRAPH
COMPANY, defendant in error.


1. It is competent for the General Assembly to grant to a foreign corporation the privilege to construct a telegraph line upon the public domain, provided it does not authorize said corporation to take private property for that purpose without providing that just compensation shall be paid to the owners thereof. (R.)
2. The Act of the General Assembly of the State of Georgia, approved August 26th, 1872, entitled "An Act to empower and authorize telegraph companies in this State to construct their lines upon the right of way of the several railroad companies in this State," is unconstitutional and void, for the reason that it fails to provide any compulsory process for the enforcement of the payment of just compensation for private property taken under its provisions. (R.)
3. The Western Union Telegraph Company was a proper party complainant to the bill, it being interested in the result of the litigation, under its contract with the Southwestern Railroad Company for the exclusive use of the right of way of said railroad to operate and maintain its own line of telegraph. (R.)

Injunction. Constitutional law. Eminent domain. Compensation. Before Judge COLE. Bibb county. At Chambers, September 13th, 1872.

The Southwestern Railroad Company and the Western Union Telegraph Company filed their bill against the Southern and Atlantic Telegraph Company, containing substantially the following allegations: That on November 16th, 1865, the Southwestern Railroad Company entered into a written contract with the American Telegraph Company, (which has since been merged in the Western Union Telegraph Company,) by which said railroad company granted unto said telegraph company the exclusive right to put up a telegraph line or lines on the land, and along the road, of said railroad company, said company agreeing to transport along its railroad, free of charge, the materials and men of the telegraph company engaged in the business of said company, so long as said telegraph company should observe its respective

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obligations; and said telegraph company agreeing to put up and maintain a first-class telegraph line or lines along the route of the said railroad within six months after the date of the contract, and to supply one wire for the special use of the railroad company; to put up, without charge, the necessary telegraph apparatus for certain stations of said railroad company, and to transmit free of charge to all stations throughout the United States, where said telegraph company shall have offices, such messages as are usually sent by telegraph by the officers and agents of said railroad company; that the aforesaid contract was made for the mutual benefit of the railroad company and the telegraph company; that the telegraph company, relying upon the provisions of said contract, has, at great cost and expense, constructed said telegraph line and carried out all of its obligations; that the defendant, claiming to have been incorporated under the laws of the State of New York sometime in the year 1869, has, without the consent of the complainant, the Southwestern Railroad Company, against its protest, in violation of the aforesaid contract, projected a line along said complainant's road, and have already put in their places poles upon which to place the wires, the distance of twenty-five miles or more from Macon, in the direction of Columbus, and is now actively engaged in the completion and construction of said line; that if defendant is permitted to put into operation said intended, projected telegraph line, it will effectually defeat the grant of the exclusive right by the Southwestern Railroad Company to the telegraph company, and defeat the great benefits accruing to the railroad company under that contract; that defendant has no authority of law to infringe on the private property of the railroad company; that all of corporators of defendant reside out of the State of Georgia, and have no property in said State beyond its line of wire, battery and office fixtures, of small and insignificant value, wholly inadequate under any circumstances to protect, indemnify and compensate complainants, for the intended invasion of their rights and property; that said defendant has



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an office in the city of Macon, county of Bibb, occupied by a superintendent of the projected and intended telegraph line—one W. S. Morris. Prayer: that the writ of injunction may issue, restraining defendant from any further work on said projected telegraph line until the further order of the Chancellor; that the writ of subpoena may issue.

Complainants amended their bill substantially as follows: That the right of way of said railroad company covers a strip of land on each side of its track extending seventy-five feet from the centre, the whole length of said railroad belonging to said railroad company, absolutely and in fee, acquired by said company, by purchase, donation and otherwise; that said company, at great expense and labor, cleared said strip of land of all its trees and other obstructions, and annually, at great cost and expense, continued to keep it clear of trees, etc.; that the appropriation of said land by defendant for a telegraph line, without compensation to the railroad company, not for the public use, but for the private use of said defendant, is illegal and unauthorized.

The answer of defendant, among other defenses unnecessary to an understanding of the decision of the Court, set up an Act of the General Assembly of the State of Georgia, approved August 26th, 1872, entitled "An Act to empower and authorize telegraph companies in this State to construct their lines upon the right of way of the several railroad companies in this State."

The injunction was refused by the Chancellor, and complainants excepted and assign said ruling as error.

LYON & IRVIN, for plaintiffs in error.

1. The acts of the Southern and Atlantic Telegraph Company are wholly illegal, and without authority of law, being a corporation existing and acting only under the laws of New York; such laws have no force or authority in the State of Georgia. Its incorporation gave it no right to do business in

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this State: *Story vs. Conflict of Laws*, secs. 22-29, 32-35, 73, 102; *Blanchard vs. Russell*, 13 Mass. R., 4; *Saul vs. his Creditors*, 17 Martin's R., 595-6; *The Bank of Augusta vs. Earle*, 13 Peters, 589. As to extent of recognition by this State: See Code, sec. 1679. 2. The right of eminent domain is inherent to the several States, and not to the United States: *Pollard vs. Hagan*, 3 How. U. S., 212. And under this right the State may take the private property of individuals for public use, upon just compensation being made: *Calder vs. Bull*, 3 Dallas, 400; *Bonaparte vs. Camden and Amboy Railroad*, Baldwin's Cir. R., 205-239; *Chesapeake and Ohio Canal Co. vs. Key*, 3 Cr. C. C., 599; *Baltimore and Ohio R. R. vs. Van Ness*, 4 Cr. C. C., 595; *Barron vs. Baltimore*, 7 Peters, 243; *Young vs. McKenzie, et al.*, 3 Kelly, 31; *Mims vs. Macon and Western R. R. Co.*, 3 Kelly, 333; *Parham vs. The Justices, etc.*, 9 Ga., 341. 3. A franchise of a corporation may be taken in the same way, but compensation must be made for the franchise as well as all other property taken: *White River Bridge Co. vs. Vermont Central R. R. Co.*, 21 Vt. R., 590; *West River Bridge Co. vs. Dix*, 6 Howard, 507; *Mills vs. St Clair county*, 8 Howard, 560; *Richmond, Frederick and Potomac R. R. Co. vs. Louisa R. R.*, 13 Howard, 71. 4. An Act of the Legislature appropriating private property to a public use, without adequate compensation, is unconstitutional and void. *Parham vs. The Justices, etc.*, 9 Ga., 341. 5. Until this compensation is made, or tendered and refused, as provided by the charter, the property cannot be appropriated. *Young & Calhoun vs. Harrison*, 6 Ga., 157, *et passim*. 6. The right of way or land of the Southwestern Railroad is held in fee, is a part of its corporate property and franchise, and necessary for its use, existence, etc. See Charter, Pamphlet Acts 1845, page 132, section 3. 7. A highway or street, dedicated to public use as such, cannot be appropriated to other use without compensation. *Thatcher vs. Auburn and Syracuse Railroad*, 25 Wend., 462; *Presbyterian Society in Waterloo vs. Auburn and Rochester Rail-*

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road, 3 Hill, 507; Williams *vs.* The N. Y. Central R. R., 2 Smith, 1 N. Y., 97; Wager *vs.* Troy & Union R. R., 25 N. Y. Rep., 526. 8. The injury complained of here is not a mere temporary trespass, but a continued one; a lawless appropriation of the property; a destruction of the inheritance, for which the law affords no adequate relief or compensation. In all such cases a Court of equity has jurisdiction, and injunction is the only appropriate, adequate and complete remedy, and is universally entertained and allowed: 2 Story's Equity Jur., secs. 925, 927, *n.* 4; Bonaparte *vs.* Camden & Amboy R. R. Co., 1 Baldwin's Cir. Rep., 226, 231; Mohawk & Hudson River R. R. *vs.* Archer, 6 Paige, 83; Belknap *vs.* Belknap, 2 John's Ch., 463; Livingston *vs.* Livingston, 6 John's Ch., 497; Jerome *vs.* Ross, 7 John's Ch., 315; The Binghampton Bridge, 3 Wall's U. S., Rep., 51, *et passim.* 9. When the appropriation is authorized by the Legislature, equity will enjoin until compensation is made: 1 Baldwin's C. Rep., 226. 10. Whether the Western Union Telegraph Company is a proper party or not, the right of the Southwestern Railroad to the injunction is perfect. 11. Congress has no authority or power to interfere in the matter, for the right is with the State and not the United States—not even as a regulation of commerce—for that power has never been held to include *the means* by which commerce is carried on within a State: The Passaic Bridge, 3 Walls, 782. 12. Laws with respect to roads, ferries, etc., are not within the power of Congress to regulate commerce—Corfield *vs.* Coryell, 4 Wash. C. C., 371—but are reserved to the States: Conway *vs.* Taylor's Ex'rs, 1 Bl., 604; United States *vs.* The James Morrison, Newb., 241; The United States *vs.* The William Pope, Newb., 256. 13. The answer does not in fact exhibit any property whatever that would be available for compensation.

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A. O. BACON, for defendant.

1. There is a misjoinder of parties in the bill; the Western Union Telegraph Company is not a proper party to the bill, and the Judge below was right in so deciding.

(a) This is a bill filed to enjoin an alleged trespass. The right to bring such a bill only belongs to the person who has the title to, or right of possession and enjoyment, in the particular property upon which the trespass is being or about to be committed. *Morris vs. McCamey*, 9th Ga., 160; *Colquitt et al. vs. Howard*, 11th Ga., 556; *Jones vs. The Water Lot Co.*, 18th Ga., 539.

(b) The Western Union has shown no right to the benefits of the contract with the American Telegraph Company. The contract exhibited fails to show the required vote of the board of directors, and the answer expressly charges that the stockholders of the American Telegraph Company have refused to consent to the merger of their company in the Western Union. Such merger, in the absence of authority in their charters, can only be made by consent of all the stockholders: 18th How., 341, 485; 2d Russ. and My., 480; 4th Railway Cases, 492; 7th Hare Chan. R., 114; 4th My. and Craig, 134; 1st Edwards, 84; 22d N. Y., 274; 13th Eng. Law and Eq., 513; 4th Russ., 662; 1st Black, 449.

For these reasons, we say that there is a misjoinder, and that the Western Union Telegraph Company is not a proper party complainant to the bill.

2. It is avowed in the bill that the prime object of the contract was to give the American Telegraph Company the exclusive right to erect a telegraph line upon the right of way of the Southwestern Railroad Company, and as it is only practicable to construct, in this country, telegraph lines upon the right of way of railroads, to give the American Telegraph Company the exclusive right between cities connected by said railroad. So far as this contract was intended to secure a monopoly to the American Telegraph Company, it was

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against public policy, illegal and void: See the opinion of Judge McCay in the case of the C. R. R. and B. Co. *vs.* Collins *et al.*, 40th Ga., p. 628.

3. But for the purposes of the argument, granting the foregoing positions to be untenable, the bill and answer do not present such a case as will authorize an injunction against the alleged trespass.

(a) A Court of equity will not interfere to restrain a trespass by injunction, unless it be destructive to the very nature and substance of the estate, or irreparable mischief would ensue unless relief was granted, or where the difficulty of proof or other circumstances demand this remedy: *Anthony vs. Brooks*, 5th Ga., 576; *Hatcher vs. Hampton*, 7th Ga., 49; *Bethune vs. Wilkins et al.*, 8th Ga., 118; *Catching vs. Terrell*, 10th Ga., 576; *The Justices, etc., vs. G. & W. P. R. R. Co.*, 11th Ga., 246; *Peterson vs. Orr*, 12th Ga., 464; 7th Johns. Ch., 314.

(b) The Act of August 26th, 1872, points out the mode in which the damages may be assessed.

4. The Act of August 26th, 1872, (pamphlet, page 54,) authorizes the construction of this telegraph line by defendants upon the right of way of the Southwestern Railroad Company.

(a) The Act authorizes any duly incorporated telegraph company, "*having the right to do business in this State*," to construct their lines, etc. This is a foreign corporation, and it is not necessary to decide whether, without this Act, it could attach itself to the soil of Georgia. The only question is, being a foreign corporation, has it *the right to do business in this State*? Can it contract and be contracted with, sue and be sued in Georgia? The principle decided in the great case of *Earle vs. The Bank of Augusta*, 13th Peters, is, that while a corporation created in one State cannot migrate or be transferred to another State, it has, by the comity of States, certain legal existence and can do certain business in other States.

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(b) This Act is constitutional. It is the exercise by the State of the right of *eminent domain*, and provision is made for just compensation to the railroad company for damages, *if they deemed they had sustained any*. The State has not parted with its right of eminent domain, whether the railroad company has the fee or an easement in the right of way: *Mims vs. Macon & W. R. R. Co.*, 3d Kelly, 338. See, also, *Scott & Jarnigan*, Law of Telegraphs, section 27, and cases cited.

(c) This Act does not impair the obligation of contracts. The Southwestern Railroad Company could not contract that the State should not exercise the right of eminent domain over its right of way.

(d) Every presumption must be made in favor of the constitutionality of an Act of the Legislature. "The solemn Act of the government will not be set aside *in a doubtful case*:" *Carey vs. Giles*, 9 Ga., 253; *Winter vs. Jones*, 10 Ga., 190; *Boston vs. Gunby*, 16 Ga., 102; *Armstrong vs. Jones*, 34 Ga., 309; *Taylor vs. Flint*, 35 Ga., 124; *Cooley's Constitutional Limitations*, 159; *Hepburn vs. Griswold*, 3 Wallace, 639; *Miller vs. United States*, 11 Wallace, 309. More especially will a Court hesitate to declare an Act unconstitutional upon a motion for a preliminary injunction.

4. One who enters on private property by virtue of Legislative authority is not a trespasser, even if he enters before the property has been paid for. The most that can be said is, that the title does not vest until compensation has been made: *Rogers vs. Bradshaw*, 20 Johns., 103; *Bloodgood vs. M. and H. R. R. Co.*, 14 Wend., 56; *R. R. Co. vs. Davis*, 2 Dev. and Bat., 464; *Tuckahoe Canal Co. vs. R. R. Co.*, 11 Leigh, 80; 7 Barbour, 416; 7 Johns Chan., 343-4.

5. If the remedy by injunction existed, the Southwestern Railroad Company has lost its right to it by allowing us to progress with the work and expend \$10,000 before applying for an injunction. Most of the amount was expended *after it was known that the poles were being erected upon the right of*

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way, and of this amount the railroad company received from us about \$3,000. We were prosecuting the work under the express letter of a statute of the State, every step was fully known and seen daily by the railroad officials, and yet the injunction was not applied for until the work had progressed nearly one hundred miles. It is a familiar and universal principle of equity that under such circumstances a Court of equity will not interfere by injunction, but leave the parties to their action at law: *Water Lot Company vs. Books & Winter*, 5 Ga., 315.

6. As generally applicable to the case at bar the Court is also referred to the case of Attorney General *ex rel.* Baron Rothchild vs. United Kingdom Electric Telegraph Company, 30 Beavan, 287. It will be found in the note to section 81 of Scott & Jarnigan, Law of Telegraphs.

WARNER, Chief Justice.

This was a bill filed by the Southwestern Railroad Company, and the Western Union Telegraph Company, against the Southern and Atlantic Telegraph Company, praying for an injunction to restrain the latter company from erecting and constructing a line of telegraph on the right of way heretofore granted by the General Assembly to the Southwestern Railroad Company. On hearing the application for the injunction, the Judge refused to grant it, and the complainants excepted. The defendant is a foreign corporation, created and chartered by the laws of the State of New York, and claims the right to construct, erect and maintain its line of telegraph upon the right of way of the Southwestern Railroad Company, under an Act of the General Assembly of this State, passed on the 26th August, 1872. There can be no doubt, we think, that it was competent for the General Assembly, in the exercise of its sovereign authority, to grant to this foreign corporation the privilege and right to erect, construct and maintain its line of telegraph upon the public domain of this State, if in its judg-

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ment, the public interest required it, with this limitation, however, that it could not authorize this foreign corporation, or any other corporation, to take private property for that purpose, without providing that just compensation should be made to the owners of the private property so taken and appropriated, in the erection and construction of its telegraph line; and the main controlling question in this case is, whether such provision has been made by the Act under which the defendant claims. The third section of the Act declares, "that in the event that any railroad company should deem that they had sustained damage by reason of the location of a telegraph line over their right of way, the damage, if any, shall be assessed and paid as follows: The railroad company shall select one commissioner, and the person or telegraph company constructing such telegraph line shall select another, and these two shall select a third, and the three persons thus selected shall assess the damage, if any, and the amount so awarded by them shall be paid by the person or telegraph company constructing said line, to the railroad company."

It is a fundamental principle of the law that private property shall not be taken for the use of the public without just compensation, and the term just compensation, in the sense of the law, means that it shall be paid for at a fair valuation. Protection to person and property is the paramount duty of government, and shall be impartial and complete: Constitution of 1868.

The right of way of the Southwestern Railroad Company, including three hundred feet on each side of the same, is vested in that company. The fourth section of its charter vests the fee simple of the land constituting the right of way in the company, and it is the private property of that corporation; and the Southern and Atlantic Telegraph Company have not the legal right permanently to appropriate any part of its right of way—its private property—for the erection and construction of its telegraph line, without first paying the company therefor. Does the Act of the General Assembly, under which the defendant

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claims the right to appropriate and use the complainant's right of way, provide for such payment as is contemplated by the fundamental law of this State? The Act simply provides for an arbitration to assess and award the damages sustained by reason of the location of the telegraph line of the defendant, (a foreign corporation,) on the right of way of the complainant's road. There is no provision made in the Act for the enforcement of the award against the property of the defendant, either by a judgment thereon or otherwise. The complainants could not enforce that award for damages, except by a common law suit instituted for that purpose. There is no remedy provided by the Act for the enforcement of the award, even if the parties should voluntarily consent to submit the question of damages to arbitration; and if they should not voluntarily consent or fail to do so, there is no provision made to compel them. Besides, it is a fundamental principle of the law, as old as *Magna Charta*, that no person, either natural or artificial, shall be deprived of his property but by the judgment of his peers and according to the law of the land. The Constitution of 1868 declares "that the right of trial by jury, except where it is otherwise provided in this Constitution, shall remain *inviolable*."

There is no provision in the Act for an appeal from the award of the arbitrators to any Court so as to have the question of damages tried by a jury, and a judgment entered up on their verdict binding the defendant's property, and the result would be, that the complainant would be deprived of his private property for the benefit of the public, (assuming that its appropriation by the defendant is for the benefit of the public interest,) with no other security for its payment than an award of the three arbitrators against a foreign corporation, with no remedy provided by the Act for its enforcement against the property of the defendant. This is not such a just compensation for the taking of private property for public use as the fundamental law of the State contemplates. In the case of *Doe ex dem. of Carr vs. The*

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Georgia Railroad Company, (1st *Kelly*, 532,) the question whether a *judgment* against the company for the damages assessed, to be enforced by the ordinary process of the Court, or adequate security being given by the company to the landholder to pay the damages, was such a just compensation for the public use of private property as contemplated by the Constitution, was not decided in that case, but left as an open question. But in the Act of 1872, under which the defendant claims the right to take the complainant's private property for public use, there is no provision made for even a *judgment* on the award, or any other means provided for its enforcement against the property of the defendant; no provision made for a trial by jury on an appeal from the award, so as to entitle the complainant to a judgment on the verdict of a jury for the damages which would bind the property of the defendant. Under the provisions of the Act of 1872, there is no security or protection given to the complainant for taking its private property for the use of the public, unless the defendant chooses *voluntarily* to pay for it. As was said in the case of *Parham vs. The Justices of Decatur county*, (9 *Georgia Reports*, 355,) "The progression of this age requires the frequent exercise of the right of eminent domain, the necessity of right and liberty require that the citizen be paid when he is injured by it; and this Court is here to see to it *that he is paid*." In our judgment the Act of 1872, under which the defendant claims the right to enter upon the complainant's right of way, its private property, for the purpose of erecting, constructing and maintaining its line of telegraph for the benefit of the public, is unconstitutional and void for the reasons heretofore stated, and that the injunction prayed for was the appropriate remedy in view of the facts of the case, and should have been granted. The only *apparent* interest which the Western Union Telegraph Company has in the question, arises from the fact of its contract with the Southwestern Railroad Company for the *exclusive* use of its right of way, to operate and maintain its

own line of telegraph, and being interested under that contract, it was a proper party to the bill to the extent of that interest only.

Let the judgment of the Court below be reversed.

S. PERCY GREENE *et al.*, plaintiffs in error, *vs.* JAMES H. LOWRY, defendant in error.

1. When in November, 1864, a contract was made for board for a year, and in February, 1865, a note was given for the sum agreed on, but the boarding ceased in August, 1865, and in November, 1865, the parties had a settlement, and the equities of their Confederate contract were agreed upon, the true value of the board actually received, settled, and a new note given for what was due :

Held, That this contract of November, 1865, was not a renewal of the note of February, 1865, and that the tax affidavit, required by the Act of October 13, 1870, was not necessary.

2. In this case we think the verdict of the jury is fully supported by the evidence, and there being no material error in the charge of the Court, there was no error in refusing a new trial.

Relief Act of 1870. Tax affidavit. Renewal. Evidence. Before Judge PARROTT. Whitfield Superior Court, April Term, 1872.

James H. Lowry brought complaint against S. Percy Greene and Julia Greene upon the following note, to-wit:

"\$450.00. One day after date, we, or either of us, promise to pay James H. Lowry, or bearer, the sum of four hundred and fifty dollars, for value received. This Nov. 18th, 1872.

(Signed)

S. P. GREENE,
JULIA GREENE."

Plaintiff introduced the note sued on and closed.

The defendant, S. P. Greene, testified as follows, to-wit: Witness is one of the defendants. His sisters—one grown, two children—went to board with plaintiff the last of Novem-

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ber, 1863. Witness was in the Confederate army; returned home in February, 1864; while there proposed to plaintiff that they should settle the amount due for the board of his sisters. Plaintiff said he would charge only for the actual cost of the provisions consumed. Plaintiff and witness made a calculation of the cost of the provisions, for the articles, and at the price named by the plaintiff, and found the amount due for one year's board to be \$1,250 in Confederate money. Plaintiff thought the amount too small; witness proposed \$2,000; plaintiff being still dissatisfied, was asked how much would satisfy him; he said \$2,500 would; witness agreed and gave plaintiff a due bill for that amount in Confederate money. Defendant had one negro boy about grown, who worked for plaintiff all the time; a negro man who worked one day in each week, and a negro girl who worked for plaintiff when not employed in attending on his sisters' chamber. Witness turned over to plaintiff a negro man worth \$4,000, with orders to sell him and pay himself the amount due him, and use the balance in his business, subject to the order of witness or his sister. This negro was not sold, but remained in plaintiff's hands until he was emancipated. Witness went from Forsyth, where plaintiff lives, to Macon, and there gave to Colonel J. F. B. Jackson, a friend of his, who was dealing in negroes, an order to plaintiff to turn over the negro to him, with directions to Jackson to dispose of the negro and turn over the proceeds to plaintiff. The negro's name was Aleck. After the war witness told plaintiff he wished to have an adjustment of matters between them, and proposed that they should arbitrate it; but plaintiff did not agree to do so. On the day of the giving of the note sued on, witness and sister went to plaintiff's house, by his invitation, to settle the matter; and witness' sister proposed that the matter should be left to disinterested persons. Plaintiff demurred, and asked defendant what they thought they should pay him. Defendant said they did not know, and told plaintiff to say. Plaintiff said he knew that they were

unable to pay him anything then, and did not know when they would be, and that, therefore, he would be obliged to charge them more than he otherwise would, and named the amount mentioned in the note—\$450—and said that if they would give him their note for that amount they could have their own time to pay it; that he would never in any way press them for the money, but that they could pay it when they could without inconvenience to themselves. This was before witness was aware of the passage of the Scaling Ordinance of the Convention of 1865, it having been passed but a day or two before, and witness not knowing but thought he was liable for the whole amount of his due bill (\$2,500), and relying on the promise of the plaintiff that he would never be pressed on the note, gave the note sued on. Witness had had the utmost confidence in plaintiff. Witness had never done any business for himself; had left college for the army, and remained in the army until the close of the war; was, when he gave the note, between twenty-two and twenty-three years of age. Witness was informed by Mr. Spriggs, who owned an adjoining farm, that plaintiff had proposed to sell him the note sued on, and told him that if he would buy it, he could compel witness to cut him off part of his farm to pay it, whereupon witness wrote to plaintiff that he considered he had broken his promise, upon which he had relied when he gave the note, and, if this was true, he would not pay the note, but proposed that they should leave the matter to arbitration, whereupon plaintiff brought suit on the note. The farm belonging to the estate of E. N. Greene, (witness' father,) is worth from \$2,000 to \$4,000; there are four heirs. Witness got from plaintiff, in February, 1865, some jeans to make an overcoat, also money—thinks \$50 in Confederate money—to buy buttons for it. Witness was at plaintiff's house but once while his sisters were boarding there, until the close of the war; that was in February, 1865; he remained there weeks, boarding at plaintiff's house; knew about the negro's working from what plaintiff told him. The

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negro boy Aleck, turned over to plaintiff to sell, belonged to the estate; there had been no division of the property left in the will of witness' deceased father. Witness was the agent of his uncle, James Greene, one of the executors, to manage and control the property; does not know when the negro, Aleck, came to plaintiff's possession; this negro was in Columbus at the time, and he ordered him sent immediately. His sister, Julia, is older than he is; one or the other of them would be the head of the family; their interest in the land would not be much more than the homestead. There was some stock on the place, but not over the amount of exemption allowed by law. Witness says that the note in evidence is in his hand-writing; that it was given in settlement of all matters between the parties, and that he knew all the facts then, except what he has since learned from Colonel J. F. B. Jackson. Sometime after the note was given, he (witness) put the stamps on it and canceled them. He had never paid or offered any payment on the note; did not see plaintiff and ask him if he proposed to sell the note to Spriggs, but as soon as Spriggs told witness about plaintiff's offering him the note, he wrote plaintiff that he might sue—that he would not pay the note; considered himself released; but if he would submit it to arbitration, he would pay what the arbitrators said. Witness' recollection is, that he was admitted to the bar in October, 1867. Plaintiff came to witness' house to get him to go and see Spriggs; plaintiff wanted to raise money; witness told him Spriggs was not at home, and he (witness) did not think he had any money on hand. All the estate E. W. Greene had left at the close of the war was the farm, in a very dilapidated condition.

Defendant also introduced the answers of Miss Julia Greene to two sets of interrogatories, which are as follows, to-wit: To the first set she answers: I am one of the defendants, and sister to S. P. Greene, the other defendant; when we first went to Mr. Lowry's house we rented a room from him for three weeks, and furnished our own board dur-

ing that time ; at the expiration of that time plaintiff moved into a different house ; we again rented a room from him and proposed to furnish our own board, but plaintiff insisted that we should board with him ; he said that he would feel better if we would, as brother was in the army ; I then asked him what he would board us for ; he said he would prefer making a contract with my brother when he came home ; but for us to suffer no uneasiness about that, as he would charge nothing more than the actual cost ; this was the only agreement we made. I have two sisters, one was fourteen years old and the other seven ; I was present when a subsequent agreement was made between plaintiff and my brother, the other defendant in this cause, in relation to the board of myself and sisters ; that agreement was that we were to pay him twenty-five hundred dollars in Confederate treasury notes for one year's board ; there was no time mentioned at which it should be due, at least I do not recollect any ; my recollection is that I was indebted to the plaintiff in the sum of three hundred dollars, Confederate treasury notes, that he loaned me about the time of the surrender ; my brother was indebted to him for a jeans overcoat, bought from him about Christmas, 1864 ; I do not know at what price or what kind of money it was to be paid in ; my brother, S. P. Greene, and myself had a conversation with plaintiff some time in the fall of 1865 with regard to the amount we were due him ; we proposed to leave the matter to arbitrators to say how much we should pay him in good money ; he did not accept this proposition, but said he knew our circumstances, and knew that we were unable to pay him at that time, but he wanted us to give him a note, remarking that we were all liable to die, and said that we should not be pressed for the money ; I considered that I was not indebted to the plaintiff in the amount of the note sued on in good money at the time I gave it ; I knew we owed him something and I felt mortified that we were unable to pay it, and I wanted Mr. Lowry to be satisfied, and I thought we would be better able to pay

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the amount the note was given for in two or three years than the half of it at that time, and Mr. Lowry promised faithfully that we should not be pressed on the note until we had ample time to pay ; these considerations were the inducements for my signing the note. I know that my brother, S. P. Greene, turned over to plaintiff a negro man about Christmas, 1864, to be disposed of by him as he thought proper and the proceeds applied to the payment of our board, and the remainder, if any, to be used by him as he desired ; the negro remained with plaintiff until set free ; he was a stout, healthy negro, twenty-eight years of age ; during the time that we boarded with plaintiff I had a negro girl that did his house work, a negro boy sixteen years old that worked for him, and a negro man that worked at least one day in each week for plaintiff ; besides this I had on hand at the time, which I turned over to plaintiff, provisions worth \$400 in Confederate notes. My brother, S. P. Greene, wrote the note sued on ; I did sign it ; it was given for board ; I knew what was in the note when I signed it ; I saw my brother sign it, and we agreed to pay that amount ; the conversation I have testified about occurred before the signing of the note ; I cannot tell when the note was stamped or who did it, as I was not present ; Mrs. Lowry and her two daughters were present ; I do not know who was present when it was stamped ; the note was made at plaintiff's house ; don't know where it was stamped ; I am defending the suit because plaintiff deceived me by telling me that we should not be pressed upon the note, and I would still be willing to pay full amount if plaintiff would give the time as he promised ; the defense is an effort to reduce the amount of the note.

To the second set she answers as follows : I am a party to the suit, and I know the parties ; I and my sisters did live in plaintiff's family parts of the years 1864 and 1865 ; I was living with my uncle, who was connected with the hospital, which was ordered to Mississippi ; my uncle insisted that I should go with him ; I refused to go on account of

the difficulty of traveling, and I wanted my sisters to be at school ; uncle finally consented for me to remain and to go to see plaintiff as to what arrangements might be made about board, etc., having understood that plaintiff was to occupy the house uncle then lived in, which was a large hotel ; but plaintiff informed me that he did not intend to keep a boarding-house, but he, plaintiff, suggested the idea that I could occupy a part of the house, which fact I reported to my uncle ; shortly afterward plaintiff came to the house or hotel and, in my presence, my uncle made a contract with plaintiff for me to occupy a part of said house, and have the use of an outbuilding for a kitchen ; though terms were not agreed on, plaintiff said to uncle that they should be easy or words to that effect ; a few days after this talk uncle moved with the hospital and plaintiff moved into the house ; I did live in the same house with plaintiff for three weeks before eating at his table, occupying the rooms. About this time a raid was being looked for and plaintiff moved in haste into a smaller house, thinking it would be safer, and by invitation of plaintiff and family I moved into the same house with them ; I and my sisters occupied only one small room and I intended furnishing my own provisions as in the larger house, but plaintiff said it would be very inconvenient to have two tables, as the house was small and but one kitchen, and he told me if I would agree to eat at his table it should not cost me any more than if I supplied myself ; I did furnish plaintiff with two bushels of wheat, four of rye and three and a half bushels of meal or grits, a large quantity of soap, and other articles of less value. I did lend plaintiff between one and two hundred dollars shortly after commencing to eat at his table ; plaintiff did return all except fifty-six dollars, one hundred dollars of which was used to pay my sister's tuition. Plaintiff did lend me about three hundred dollars in the spring, about the time of the surrender ; about the same time he let me have ten yards of domestics ; during the same spring I did buy from plaintiff some domestics, ten yards ; plaintiff did not

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furnish me with any money of his own to pay tuition ; plaintiff did not furnish me or my sisters with any furniture except a vessel to carry water in, and that only for a short time ; I had a bedstead of my own and the usual furniture of a chamber ; sister Mary did sleep a part of the time with one of plaintiff's daughters by the request of plaintiff and wife. I did lend plaintiff's wife window curtains for her parlor, some silver and plates for her table, and other little articles. My means of support was from the labor of my negroes ; we had thirty-nine negroes outside of the lines, hiring for about five thousand dollars per annum ; the negroes I had about the house came up the country about the time I came ; I suppose I was in no greater danger of starving than the people, and in no danger of being without a home ; I could have lived without the charity of plaintiff, and did live without it ; I could have boarded with my aunt, who lived six miles from Forsyth, but I preferred staying where my sisters could go to school. Plaintiff was considered of very limited means ; I know nothing he had except a very small stock of goods : at the time I went to live with plaintiff I did not say anything to him about expecting my brother, for the reason that he was with Hood on his Tennessee campaign ; my brother did return to Forsyth some time in February, 1865 ; the same morning he left for his command he, brother, called me into the room where he and plaintiff were and a part of plaintiff's family, and told me, in their presence, that he wished to relate the contract, which was that he was to pay plaintiff twenty-five hundred dollars in Confederate money for one year's supply of provisions, wood, lights, etc., and in addition plaintiff was to have the services of one negro boy sixteen years old, and one day's work in each week of a negro man, and a negro girl about grown, the time she was not needed to wait on me ; before my brother's return, in February, 1865, I at different times called on plaintiff to know what my proportion of the expenses would be ; plaintiff would tell me not to make myself

uneasy ; that he would not be hard, but would do what was right ; that he preferred to make the contract with brother ; he did, however, offer to take the hire of the negro boys I had in Forsyth for our expenses ; the boy John furnished plaintiff with most of his firewood ; by request of plaintiff and wife the boy Gus was in his service, and the girl Becky did most of their household work, besides helping in the kitchen ; plaintiff had an old negro woman all the time belonging to Mrs. Wilson, and a negro for about two months who was in bad health ; I do not know to whom said negro girl belonged ; I do not know what he was to pay for them. Brother and myself went to plaintiff's house on purpose to make a settlement, and in the conversation brother said he thought it would be hardly right to settle on the basis of the former contract—namely, twenty-five hundred dollars in Confederate money—and plaintiff assented, and said he did not think it would be fair ; brother insisted on plaintiff's saying what he thought would be right, and plaintiff insisted for him to say ; Mrs. Lowry was present, and said to plaintiff "You know what you are going to do" ; plaintiff said that he was aware of our circumstances ; that we were broken up and not able to pay the money at present, and proposed to take a note for four hundred and fifty dollars, stating at the time that the reason for asking our note was the uncertainty of life ; that he would never press us on the note, that we should have our own time and pay along as we could conveniently do so. The consideration was not talked over at that time ; brother did not promise plaintiff any hogs, corn or lumber at that time. We did not express ourselves as to whether we thought the note too large or not, but gave the note. About one week after the note was given I met plaintiff in Dalton, who told me that, through ignorance, we had signed the note without stamping it, as the law required. Shortly afterwards brother told me that he had stamped the note. Plaintiff did not pay any doctor's bills for me or my negroes. The negro boy Aleck was sound so far as I know,

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but when he came to Forsyth he had the signs of having been severely whipped, though not at all disabled. I do not recollect how long said boy was in plaintiff's possession; plaintiff told me he could sell the boy at any time, but he would not do it now; that he would not be in a hurry to sell. I consider that the signs of the lash would detract something from the value of the negro. I saw Mr. Jackson's letter to plaintiff, asking him to send the boy to him and he would sell him. Plaintiff said that he would not send the boy to Jackson; that he would sell him himself. The boy was no expense to plaintiff, as far as I know. I never heard plaintiff claim, at any time, to have paid a doctor's bill for me. I know that this boy was stabbed about the time of the surrender; whether before or after I do not recollect. The place where the government supplies were kept was near plaintiff's house, and when the enemy was near it, was opened to every one to come and take, and my negroes, with my consent, brought to plaintiff a large quantity of provisions, consisting chiefly of corn, peas and bacon, and a large lot of this corn plaintiff had ground up and brought with him to Dalton—I suppose at least thirty bushels. Mr. Wilson furnished at least a part of the provisions on the trip up. In the spring, about the last of February, 1865, plaintiff and myself and sisters moved back to the hotel, and, when the hospital returned, the post surgeon demanded of plaintiff the house. About the time uncle left me, he and myself made a proposition to plaintiff to live in his family; since that time all the propositions for this purpose came from plaintiff and family. It was understood that if it was a boarding house, and that if it could be proven that I was boarding there, plaintiff could be dispossessed; and it was said in the family that there were no boarders in the house. House rent was very cheap; at that time many good houses were unoccupied. I did answer interrogatories in this case before. I did know as much then as now, but on being further interrogated, I have stated more now than then. I did know all the facts testified to, and

I and brother did sign the note, and did promise to pay plaintiff on certain conditions. I consider that we kept that promise in good faith until plaintiff violated the conditions. There was a balance due plaintiff for provisions, according to previous contract. I and brother did agree upon that settlement, and did promise to pay it, knowing then all that we know now; but promised only on the condition and mutual understanding that plaintiff would never press us; that we should have our own time and pay when convenient. I did intend to pay the note when I signed. With us times had been very hard, but I think some part of the note would have been paid had it not been sued. It was my intention to pay the note according to the contract, which contract, or faithful promise, was broken by plaintiff by offering to sell the note, and afterwards suing on it. My reasons, moral and legal, are because the conditions upon which that promise to pay was made were violated by plaintiff; these being violated, I think it too much.

Defendant next introduced the deposition of J. F. B. Jackson, as follows, to-wit: I know the parties in the above stated case. There were arrangements made with me by S. Percy Greene about the negro. I met with defendant (Greene), I think, in January, 1865, in the city of Macon, and let Greene have some money—\$300. I think he gave me a note, or rather an order to Mr. Lowry for the negro, Aleck. I sent the order to Mr. Lowry and wrote him to send the negro down; did not hear from him for a few days, and wrote him again. I don't recollect the contents of his letter fully at this time. I heard from him, but he said he would take him himself, or could sell him there, I don't recollect which. He made inquiry as to what I was to give for the negro. I was up in Forsyth shortly after the correspondence with him about buying the negro; called to see Mr. Lowry, and saw the negro; didn't examine him closely; he looked well. I told Mr. Lowry the arrangements that defendant (Greene) had made with me were to sell the negro, pay myself the

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money he had got, and send the balance to Mr. Lowry to pay the board for his sisters, and to be used for their benefit; told him that Green had instructed me to take him for what I thought he was worth and pay the balance, after my money was taken out, but I had told him I would sell and give them the benefit of what he would bring. Don't recollect Mr. Lowry's exact reply; he never let me get possession of the negro. I saw S. Percy Greene in the city of Macon, I think, in January, 1865. Greene got from me \$300 and gave me an order to Mr. Lowry for the negro. I was to pay myself, and send the balance of the money to Lowry for the benefit of Greene's sisters. I wrote to Mr. Lowry and sent Greene's note or order and did not get the negro, but an answer from Lowry; don't recollect the contents of the letter fully, but he gave some excuse for not sending him. The letter, I think, was dated in January, 1865. I don't recollect all the contents. I think it was in January, but it might have been early in February. He said he preferred to manage it himself. The letter, I suppose, that Mr. Lowry wrote is destroyed, as I have destroyed pretty much all of my old Confederate letters. Don't recollect that Mr. Lowry spoke of the negro being unsound. Don't recollect the exact language used by him in his excuse for not sending him down to me—for not letting me have him when I was in Forsyth—but I understood from him that I could not get him; think he said he preferred controlling the matter himself. I know nothing else to benefit the defendant. The negro looked well when I saw him. I saw the negro, but did not examine him closely. I don't think the letter is amongst any of my old papers.

The defendant next introduced the deposition of Miss Mary Greene, as follows, to-wit: I know the parties, and am sister to the defendants. I did live with my sister in 1864 and 1865. I did live parts of the years in the family of plaintiff. Plaintiff kept a very poor table indeed, and his family complained very much about the fare; said it was much worse than they were used to. We did live in the same house with plaintiff

before eating at his table. While we boarded to ourselves our fare was not extra, but it was much better than when eating at plaintiff's table. Plaintiff did not furnish any lights. Plaintiff moved from the house where we were boarding ourselves, and we were invited by plaintiff's family into the same house with them; we did so. Sister furnished plaintiff with one or two gallons of lard, some sugar, several sacks which I suppose contained grain of some kind. I do not consider we were in any more danger of starvation or of being without a home than other people in the same town. I have no doubt we could have boarded elsewhere in town or gone to aunt Wilson's, some six miles in the country. We had had negroes hired, and our support might have been derived from their wages. Plaintiff had no visible means of support except a small store. I and my sister did go to school at the time. I asked plaintiff for money, which he had borrowed from sister, to pay my tuition, and he gave me \$100. None of plaintiff's family was present at the time. I was fourteen years old; my sister was six years old. The negroes who worked were a girl who did his house work, a negro boy, Gus, (what he did I don't know,) and a negro man, John, who worked one day in each week. Plaintiff had an old negro woman; he had also a girl a short time, who was in very bad health. Plaintiff furnished us a water can for a short time for our room. We had the ordinary furniture of a chamber of our own. Sister furnished plaintiff's wife with some parlor curtains and some table ware, and some other little things. At plaintiff's daughter's request I slept with her about six months. I do not know of plaintiff's ever paying a doctor's bill for any of us. I never heard plaintiff claim to have paid any doctor's bill for us or our negroes. Plaintiff had a negro of defendants in his possession; said negro had been whipped severely, but could still support himself. Plaintiff said he could sell him at any time, but wanted to get a good price for him. The tax in kind was opened to everybody just before the Federal troops came, and our negroes brought to plaintiff's house a large

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quantity of grain ; plaintiff brought a part of the same grain to Dalton. Sister did buy and pay for some domestics, but how much I do not know. Mrs. Wilson furnished provisions for us on our trip home. Sister got the lard and sugar from uncle James Greene, before he left with the hospital ; as to the sacks, I don't know where she got them—one or two gallons of lard and some sugar. I don't know the quantity—both of good quality. I did not conceal any fact I have now testified to, as to what brother and sister knew then or now. I don't know whether defendants have paid or offered to pay plaintiff anything or not. Defendant did not read the interrogatories of plaintiff's wife to me. I do not know whether he read them to sister or not ; he did not tell me nor do I know what points he wants to prove. None present but the commissioners when my answers were written and sworn to.

Plaintiff, in rebuttal, introduced the depositions of M. E. Lowry, M. H. Swick, and H. C. Henderson, who all testified as follows : We know the parties ; Miss Julia Greene, one of the defendants, came to plaintiff to know if plaintiff would take her and her two sisters to board ; plaintiff at the time refused to take them, and after some persuasion consented to rent the three sisters a room in a large house which he, plaintiff, was to occupy in a day or two ; plaintiff did move to the house immediately after it was abandoned as a hospital, and the three sisters were allowed to rent and occupy one room in said house for about three weeks ; at this time, which was about the 16th of November, 1864, General Sherman's army was expected to come into Forsyth, and plaintiff determined to move, and did move, into another house, thinking it would be less likely to be molested by the army if it did come. At this time Miss Julia Greene, one of the defendants, applied to plaintiff again, and insisted that plaintiff should take her and her two sisters to board, and said to plaintiff that her brother, S. P. Greene, would be at home in a few days, as she was expecting him home on a furlough about that time, and that when he did come he, S. P. Greene, would make

arrangements with plaintiff to pay him for their board, and also to board a servant girl belonging to them, for which he, plaintiff, would charge half price only of boarding one of the sisters, on condition that said servant girl should do work for plaintiff's family at times when she was not waiting on her young mistresses; witnesses all state that none of the servants belonging to defendants ever did any working or cooking for plaintiff's family, as plaintiff had a servant woman hired at the time from another party. Witnesses all say that plaintiff's wife agreed with Miss Julia Greene, at her, Miss Julia Greene's, solicitation, to take a small servant boy she had with her, and board and clothe him for his services, and that such board and clothes were all the services of said boy were worth; this boy and servant girl boarded at half price under the contract above named, and were all the servants who worked for plaintiff, and who belonged to defendants, until the February following, when S. P. Greene proposed to plaintiff that if he, plaintiff, would continue to board his sisters that plaintiff could have the services of his man servant John as much as one day in each week to work in the garden when gardening time came on; these were all the servants of defendants that ever did any work for plaintiff or his family, and the contracts for their work were made as stated above, and the witnesses think that the remuneration was ample for the services rendered. As above stated the board of the three sisters and the servant girl commenced on the 16th day of November, 1864, and continued until the 6th day of August, 1865, at which time plaintiff and family landed back at Dalton, Georgia. When Miss Julia Greene and her two sisters came to board with plaintiff all the provisions they brought with them was a small quantity of corn meal, about one peck, worth about two dollars probably; plaintiff never went to either of the defendants to get them to board with him, but one of the defendants, Miss Julia Greene, came to plaintiff twice and insisted on plaintiff's taking them to board with him before

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plaintiff even consented to do so ; S. P. Greene boarded with plaintiff during the time his sisters were there about five or six weeks, witnesses cannot state positively the exact time. Witnesses all know that plaintiff furnished S. P. Greene with a beautiful fine piece of grey mixed jeans, sufficient to make him a long and large overcoat, with large cape to it; also with a piece of jeans to make a vest, but they are not positive whether he furnished enough for pants or not; witnesses all know that plaintiff also furnished him with sixty dollars Confederate money with which to buy himself a set of staff buttons for the overcoat above alluded to ; witnesses do not know, of their own knowledge, that plaintiff furnished S. P. Greene with any other money. In February, 1865, S. P. Greene came to Forsyth, Georgia, on furlough, and while there he told plaintiff that he, defendant, had a negro boy at Columbus, Georgia, and that he would send for him and have him brought to Forsyth, and when the negro got there he, defendant, wanted plaintiff to take charge of him, the said negro man, and sell him for the use and benefit of defendants. Some time in the month of March, 1865, the said negro came to Forsyth and was in a condition not able to do any work or service of any kind ; the man said that his condition was the effect of a fall he got off a chimney in Columbus, Georgia ; the man moped and creaped about the yard of plaintiff on a stick, and looked as if he was not able to do any service ; witnesses all say that while he was in that condition two or three parties came to look at him, but after seeing and examining him they said he was not a sound negro and they did not want him ; witnesses all say that while there, and during the time he was in the condition before mentioned, that he and another negro man had a difficulty ; the sick negro received a stab in the fight which disabled him still more, and from which he did not recover until after the surrender of the armies ; witnesses do not know what price defendant instructed plaintiff to ask for said negro man. Plaintiff furnished Miss Julia Greene, one of the de-

defendants, three hundred dollars with which to buy a silk dress and one hundred dollars to pay tuition for her two younger sisters, and one hundred dollars worth of domestics, which plaintiff furnished her at her request; the children went to school, and plaintiff furnished the one hundred dollars to pay tuition as above stated; Miss Julia Greene did not profess to have any money when she came to plaintiff's to board, nor did S. P. Greene leave any money with her while there.

Mrs. M. E. Lowry says: She heard S. P. Greene say to plaintiff that he, S. P. Greene, wanted plaintiff to loan him some money, that he was out of money and needed some to go to his command; this was on the night before S. P. Greene started back to his command.

Witnesses all say that they do not know of defendant's giving any note for twenty-five hundred dollars in Confederate money or any other sum, and do not think that any such note was given, as they never heard of any such transaction; they were all present at the time the settlement was made; that it was made at plaintiff's house in Dalton, Georgia, and that the note was given by each defendant signing their own name, and after all the trouble and expense and everything had been fully talked over by all the parties; after all the matters and prices had been talked over, plaintiff remarked to defendants that they could retire to a room and consult the matter over; that he, plaintiff, wanted them, the defendants, to be satisfied before they signed the note; defendants replied, "No, we want you to be satisfied, for," said they, "you have been kind to us, and been at a great deal of trouble and expense, and we are willing to pay you for it; we are satisfied that four hundred and fifty dollars is a fair price, and we are willing to sign the note." Miss Julia Greene remarked that "plaintiff and family had been the kindest and best friends to her and her sisters she had ever met since the death of her parents." Plaintiff remarked to defendants that "if they would pay the note off by Christmas he, plain-

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tiff, would deduct twenty-five dollars from the amount of the note, as he, plaintiff, was in great need of money at that time"; defendants replied that they would pay off the note as soon as possible; S. P. Greene said he would let plaintiff have some hogs for pork, some corn, and some lumber with which to enclose his lot, and would do all in his power to pay off the whole amount as soon as possible; but the defendants said they did not want any deduction made from the amount of the note; that less than the whole amount would not remunerate plaintiff for his trouble and expense; the price agreed on by plaintiff and defendants was less than the board, money advanced, trouble, etc., which plaintiff had with defendants, and the amount of the note, four hundred and fifty dollars, was cheap in greenback money for it all; witnesses did not hear plaintiff say that he would wait longer than the Christmas following the date of the note. Plaintiff sued defendants on the note in consequence of two letters which plaintiff received from defendant, S. P. Greene, in which he stated to plaintiff that if ever he got the money on the note he would have to sue for it; witnesses do not know what plaintiff charged for house rent for servants, but that item as well as all the others were spoken of in the general settlement; S. P. Greene, defendant, canceled the stamps on the note at defendant's house; this took place, as well as witnesses recollect, in June, 1866; witnesses do not recollect what S. P. Greene said at the time; he was a lawyer at that time, at least he had the title of lawyer. Plaintiff boarded Julia Greene and sisters from November 16th, 1864, until August 8th, 1865; plaintiff lived during that time at Forsyth, Georgia, except during three or four days while he was running from Forsyth to Dalton, Georgia, at which place he landed the 8th day of August, 1865; provisions of all kind were high and scarce in all that country at the time plaintiff boarded them; witnesses do not now recollect the prices of provisions, but know they were high and scarce; during said boarding a portion of Sherman's army passed near Forsyth

and destroyed a great many provisions, houses, etc.; as before stated, provisions were high and scarce, and hard to procure. Defendants justly owe plaintiff the amount of the note; they seemed perfectly satisfied with the settlement at the time it was made, and so expressed themselves unreservedly.

J. H. Lowry, the plaintiff, testified as follows: Miss Julia Greene and two sisters went to board with witness in November, 1864; S. P. Greene came home in February; witness remembers the calculation spoken of by S. P. Greene, but does not remember any due-bill being given. The negro man Aleck, spoken of by S. P. Greene in his testimony, witness did not receive until some time after Greene left Forsyth; the negro was not well when he received him, (negro said he was hurt by the falling of a chimney); witness offered negro for sale; several parties looked at him; these parties said he was not a sound negro and would make no offer for him; John Thomas was one of the parties; witness did not examine the negro particularly; the negro came to him some time in March; the negro did nothing but mope and limp about the yard; some time before he recovered he got into a fight with another negro and was badly cut or stabbed; the cut was serious but not dangerous; witness did not deliver the negro to Frank Jackson because he did not demand him; the negro was in no condition to sell or offer for sale; he, plaintiff, and Julia talked about the negro, and about sending him to sell, and she advised against it; feared the negro would run away if he heard of it, and they kept the matter very close; he knew the condition of the property of the estate, how it was situated; witness never offered to sell the note to Spriggs without the consent of defendants; never intended to sell or dispose of it without their consent; he sued the note in consequence of notes received from S. P. Greene, defendant, that he would have to sue if he got his money; at the time the note was given witness told defendant he was needing money badly, and if they would pay him by Christmas he would knock off

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twenty-five dollars; they said they would pay him as soon as they could; that he had been kind to them and they did not want him to knock off anything; afterward S. P. Greene told him that some leather he promised to let him have and the note was rotten and of no use; witness paid the doctor for attending the negro when he was stabbed; some two or three weeks after the note was given witness went and bought the stamps and gave them to S. P. Greene, who put them on the note and canceled them; J. F. B. Jackson came to Foyth; witness does not remember what conversation was had between Jackson and himself; does not think Jackson demanded the negro. Witness paid tax on the note sued on until 1869, when witness consulted Judge Walker about continuing to pay tax on it, and Walker advised him to stop paying it; witness was talking to Judge Walker about the claim and the taxes, and Judge Walker asked him if he regarded it as a good debt, and witness told him he did not then; Walker advised him that he did not think it was necessary for him to pay tax on it any longer, and witness stopped paying tax on it; he knew how the property of the estate of E. W. Greene was situated; witness stopped paying tax on the note because he did not think he would be able to collect it on account of the relief laws; that was the reason he did not know or believe he could collect the money.

It was admitted that the records of Whitfield Superior Court showed that S. P. Greene was admitted to practice law at the October Term, 1866, instead of 1867, as he collected.

Plaintiff also introduced in evidence the will of E. W. Greene, deceased, which it is not necessary to here set forth.

The Court charged the jury as follows, to-wit:

"If the new note was given for the old one and other things, and you cannot determine how much of the new note the old one was the consideration of, then it is not a mere renewal and no affidavit of taxes would be necessary. But if the new note was given for the old note and an open a

count, as for services, previously liquidated, and not as an equitable adjustment, and itself a liquidation of the original value of the board, etc., then it would be regarded as a renewal, though it was a renewal of several separate debts. In that case the tax affidavit would be necessary, and you would in that case find for the defendants. Unless there is fraud, imposition or mistake, a new term cannot be added to a written instrument by oral testimony. The law rather presumes all previous oral negotiations merged in the writing, and not intended to be relied on or insisted on. But in this case you can take into consideration any promises that the collection of the note would not be pressed, together with all the other facts and circumstances, such for instance as the real value of the original consideration, the youth and inexperience of the defendants when the note sued on was made, and the influence the plaintiff probably had over the defendants or either of them, and all other facts and circumstances, in order to ascertain whether there was in this case fraud, imposition, misplaced confidence or mistake. So far as a mere promise not to sue the note is concerned, if that was all, it might be replied to by showing that the defendants notified plaintiff to sue, and that he would never get anything any other way, if the facts show that to be the case."

The Court then charged the written request of the defendants, making the additions which are contained in the brackets, as follows, to-wit:

"If the note sued on was given under a mistake of law (by both parties) as to the legal liability of the defendants, then the note does not conclude the defendants as to the amount really due by the defendants. But in this case the jury may look into all the facts and find whether anything is really due to plaintiff, and if so, how much. If the defendant, S. P. Greene, had given in February, 1865, a note or due-bill to plaintiff, payable in Confederate money, and if the note sued on was given in renewal of said note, and if at the time the last note was given, the defendants gave it under a mistake of law, (in any way induced by the conduct of the

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plaintiff or the mutual mistake of both parties,) that the whole of the Confederate due-bill could be recovered by plaintiff in greenbacks or gold, then the jury may look into the whole transaction and find what was really due to plaintiff, if anything.

"If plaintiff, to induce the defendants to make the note, made any promise which he did not keep, and did not intend to keep, this (if under all the circumstances you believe it did deceive the defendants, and induced them to make the note, when otherwise they would not have done it,) would amount to such legal fraud as would authorize you to open the whole transaction, and the note would not be conclusive as to the amount due, and you would be authorized to reduce the amount to what you find justly due on the original contract between the parties. The question for your consideration is, was there any (such mutual) mistake of law, or was there any undue advantage taken by plaintiff to induce (and which did in any way induce) defendants to give the note.

"If the jury find that the note was given in renewing a debt existing before the surrender, then plaintiff cannot recover for so much of the note as is founded on a debt existing before the surrender, as no tax affidavit has been filed.

"It was plaintiff's duty to (make reasonable exertion to) sell the negro as Greene directed, (if he was under any obligation, expressed or implied, to do so.) It was his duty to deliver the negro to Jackson, (if he was under any obligation, expressed or implied, to do so,) and if he failed to do so, and defendants have suffered loss by plaintiff's refusal, then defendants have the right to set off their loss, (provided, however, that the defendants had the right under the will to sell the slaves, for they could confer no authority to sell unless they had it themselves. I have not examined the will, which is considered as read before you. Generally there must be authority shown either by the will or from the Ordinary to authorize a legal representative to sell the property of an estate.)"

The jury returned a verdict for the plaintiff for the full amount of the note, with interest and costs of suit.

The defendants moved for a new trial upon the following grounds, to-wit :

1st. Because the Court erred in admitting the testimony of plaintiff and of his witnesses as to what the persons said who came to look at the negro Aleck with the view of purchasing him, in relation to his physical or diseased condition, said evidence having been objected to by defendants upon the trial.

2d. Because the Court erred in refusing to give in charge, without qualification, the request of defendants.

3d. Because the Court erred in the charge in relation to the necessity of the filing of an affidavit as to the payment of taxes, and upon the subject of the evidence as to said payment.

4th. Because the whole charge of the Court did not correctly give to the jury the law of the case as applicable to the testimony before them, and was calculated to mislead the jury.

5th. Because the verdict of the jury was contrary to law and the charge of the Court.

6th. Because the verdict of the jury was decidedly and strongly against the weight of evidence.

The motion for a new trial was overruled by the Court and defendants excepted and assign error upon each of the grounds aforesaid.

McCUTCHEEN & SHUMATE; S. P. GREENE, represented by R. J. McCAMY, for plaintiffs in error.

The charge as to the payment of taxes was error: 32d Ga. R., 396; 34th, 330. The charge as to fraud and mistake was error: 34th Ga. R., 485; Code, secs. 2709, 3070. The verdict was unwarranted by the evidence and should have been set aside: 36th Ga. R., 56; *Ibid.*, 362.

W. K. MOORE, by brief, for defendant.

McCAY, Judge.

Upon its face, as appears by its date, this contract is not within the Act of October 13th, 1870 ; but is claimed to be within it, because it is said to be a renewal of a contract made before the 1st of June, 1865. Is that so? When these parties came together, in November, 1865, to settle their transactions, they had the contract for the year's board to adjust, together with the other matters between. The contract for the board had been in reference to Confederate money and Confederate prices. The girls had not boarded, in fact, but about nine months, and three of those months had been after the war was over, when new rates and new prices must be agreed on. All this they adjusted; they settled the value of the board for the nine months on a new basis and at a new price; they canceled the old contract and made a new one. It is an abuse of terms to term this transaction a renewal of the old contract. It was wholly a new one, based, it is true, partly on the old consideration, but also based on the fact that the girls had not boarded for a year, and on the new consideration, to-wit: the board for three months after the war. We do not think this was a renewal. It was a new contract, having to a considerable extent new considerations, and having also new parties. Indeed, we should be slow to hold that any contract made after the war, in which the equities of a Confederate contract were adjusted, and a note taken payable in United States currency for the amount agreed upon, was a renewal of the old. Surely it cannot be said that no new consideration enters into such a contract. The adjustment of the true equities of the contract is itself a large element of the contract. In this case there is much more; here is the knocking off the three months, from August to November, and the new agreement as to the three months after the war. This is not a renewal, and the tax affidavit is not required.

When this case was before this Court on a previous occasion we granted the defendants a new trial, because the de-

defendants insisted that the note sued on was given under such circumstances as authorized them to go behind it and show that the considerations for which it was given were for less than the face of the note indicated. We did not, however, in that case adjudge that the note was given under such circumstances. The defendants offered to show facts that might lead to such an inference, and the Court rejected the evidence. In this we thought the Court erred. The parties have now been heard, and they have gone to the jury, on the trial, on the two issues presented. First, was the note given under a mistake? Were the parties when they gave it, so under the influence of the plaintiff, as that the settlement was not a free settlement of the matters between them? Second, admitting this, does it appear, from the evidence, that the note is for more than a true equitable settlement would have demanded?

The verdict of the jury for the plaintiff is sustainable if the defendants have failed to show that the settlement was not free or that it was inequitable. Our judgment is that the verdict of the jury is right under the evidence upon both points; that it is not such a verdict as this Court is authorized, under the law, to disturb. Both Mr. Greene and Miss Greene state, even now, that they have no serious complaint as to the amount; they only find fault with the act of the plaintiff in violating his promise not to sue it as soon, as by its terms he had a right to do. And even this, as it appears from the testimony, he has only done because they notified him they would never pay it except when forced to do so by law. Nor do they, either of them, pretend now, under oath, that they were at all under any improper influence. They made the settlement freely, and the amount of the note was such as they thought they were justly due to the plaintiff. If the jury were satisfied of this, (and we think there was evidence authorizing such a belief,) then they were not bound to go any further. If the parties had themselves freely gone over their Confederate transactions for 1865, and fixed what they deemed to be the amount due in United States currency,

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it was not for the jury to go over it again and apply their notions of equity to it. But had the jury done this we are not prepared to say the verdict is illegal. Barber's tables is not the only rule of the value of the board, or even of the Confederate money. As is notorious, juries have very rarely settled Confederate transactions on that basis; this Court has uniformly held that it will not scan verdicts adjusting the equities between parties growing out of such transactions very closely, and, we think, under this rule, the verdict ought not to be disturbed.

Judgment affirmed.

LEVI JOHNSON, plaintiff in error, *vs.* THE MAYOR AND CITY COUNCIL OF AMERICUS, *et al.*, defendants in error.

1. The Act of Incorporation of the city of Americus, and the ordinance passed in pursuance thereof, authorizing the arrest and detention of violators of the ordinances of said city, without warrant, are not unconstitutional. (R.)
2. In case of an arrest without warrant, the prisoner should, without unreasonable delay, be conveyed before the most convenient officer authorized to receive an affidavit and to issue a warrant, and the imprisonment of the offender beyond a reasonable time for that purpose would be illegal. (R.)
3. Persons residing within the corporate limits are incompetent jurors to try a suit against the city. (R.)
4. Where a different verdict could not have been rendered, a new trial will not be ordered though an immaterial error may have been committed. (R.)

Trespass *vi et armis*. Arrest. Constitutional law. Competency of juror. New trial. Before Judge CLARK. Sumter Superior Court. April Adjourned Term, 1872.

Levi Johnson brought trespass *vi et armis* against the Mayor and City Council of Americus, S. W. Lee and W. W. Wheeler, in which he alleged that he had been imprisoned

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without lawful warrant or authority, to his damage \$10,000. Defendants pleaded not guilty and justified under the charter of the city of Americus.

Upon the trial plaintiff objected to those jurors who were citizens of Americus. The objection was overruled by the Court.

Plaintiff testified that on the 9th of June, 1870, he was arrested by defendants Lee and Wheeler, without warrant or other writing, within the corporate limits of Americus and carried to the guard-house and imprisoned from three P. M. of the 9th, until ten A. M. the next day, when he was taken from the guard-house and carried before the Mayor of Americus, who continued the case until two P. M.; that defendant pleaded guilty and was fined \$10 and costs, which he paid; that plaintiff offered to give bond, which was refused; that he had left his wife, an aged and feeble old woman, sick at home, and appealed to Lee and Wheeler to be allowed to return to her; that Lee and Wheeler were acting as policemen under the general directions of the Mayor and Council.

Plaintiff closed.

Defendants introduced W. W. Wheeler, (defendant,) who testified that on the 9th day of June a Mrs. Randall sent for him and Lee; that when they arrived plaintiff was pulling and dragging Mrs. Randall up a gulley; that they asked Mrs. Randall if they could get a drink of water; that she consented, and when they proceeded to get the water, plaintiff called out to them that they came to arrest him. Plaintiff cursed them in a loud and noisy manner, and as Lee was advancing on him, drew a pistol and cocked it and presented it at Lee but did not fire; that Lee advanced, caught Johnson and took the pistol from him; that Johnson was very drunk; that they carried plaintiff to the guard-house and locked him up; that plaintiff was taken out at ten A. M. next day and carried before the Mayor; that the Mayor, Mr. Johnson, a Justice of the Peace, and Mr. Callo-way, a Notary Public, all resided in the city and were of easy access; that no affidavit was made or warrant sued out;

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that when plaintiff was first arrested they told him that if he would behave himself that they would let him go home, but he refused and swore he would not be arrested; that afterward when he requested to be allowed to go home, they refused to release him; that witness was merely acting in the discharge of his duty as policeman.

S. H. Mitchell, former marshal, testified that the place of arrest was within the corporate limits.

Durell Randall testified that he was city clerk; that plaintiff pleaded guilty to disorderly conduct, and was fined \$10 or sentenced to work ten days on the public streets.

Plaintiff admitted that the defendants Lee and Wheeler were prosecuted on the criminal side of the Court and acquitted.

Counsel for plaintiff requested the Court to charge the jury as follows, to-wit:

“If you find from the evidence that Lee and Wheeler, to prevent the commission of a felony, or for any lawful purpose arrested plaintiff without warrant or process of law, it was their duty to carry him without delay before the most convenient officer authorized to receive an affidavit and issue a warrant, and any imprisonment of Johnson beyond a reasonable time, for such purpose was illegal. They, in no event, had a right to imprison him for an hour or a moment until they had first carried him either before the Mayor or some judicial officer to be dealt with according to law. No man or officer has the right to imprison in the guard-house or other jail a citizen of this State without due process of law. Process of law must be in writing, and may be by warrant, by commitment, or by sentence of a competent Court. If plaintiff was pulling the woman about, and she did not resist or resent it, or manifest her opposition to it, Lee and Wheeler had no right to arrest plaintiff. The Legislature cannot delegate the power to the Mayor and City Council of Americus to pass an unconstitutional law or a law in violation of the general law of the land.”

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The Court refused to charge as requested, but, on the contrary, charged as follows :

"This is an action for false imprisonment, which consists in the unlawful detention of the person of another for any length of time, whereby he is deprived of his personal liberty.

"Was the imprisonment of the plaintiff by the defendants unlawful? If so, he is entitled to recover against the defendants whatever damage he sustained, as a compensation for the injury done. The rule I will give you hereafter.

"If the imprisonment was not unlawful, then the plaintiff is not entitled to recover.

"The Legislature of the State of Georgia, having the power under the Constitution, has delegated to the Mayor and Council of Americus the power 'to pass all ordinances, rules and regulations necessary and proper for the good government and subjection of all persons whatever.' This grant of power is very large, and sufficient to meet any case of violation of the by-laws and ordinances of the corporation of Americus. The Legislature has also vested the said Mayor and City Council with power to establish and regulate a guard, who shall have the right to take up all disorderly persons, all persons committing or attempting to commit crime, and to commit them to the guard-house to await their trial the next day. The Mayor and Council, in obedience to the power thus vested in them, passed and published ordinance 142, which says : 'Any person who shall be found in said city acting in a disorderly, riotous or tumultuous manner, or who shall be guilty of any act or acts endangering the safety of any citizen or property, or of any offense against the public peace, morality or decency, shall be arrested by the marshal, deputy marshal or any policeman, and confined in the guard-house until such time as he or she can be brought before the Mayor's Court for trial ; and any person guilty of such disorderly conduct shall be punished by a fine not exceeding twenty dollars, or otherwise in the Mayor's discretion.'

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"This law of the Legislature vesting this power in the Mayor and City Council of Americus is not unconstitutional. The Legislature had the right, under the Constitution, to grant the power to the corporation of the city of Americus and the ordinance passed in pursuance of said grant of power is also constitutional, and all persons who are guilty of disorderly conduct can be arrested at once without warrant and confined in the guard house until their trial the next day.

"It is the right and duty of the Mayor to sit the next day and try the offender, and to punish him, if guilty, in accordance with the ordinances of the city government. All governments must have such rights else discord would reign supreme in every city of the United States.

"The arresting of a disorderly citizen by the policeman of the city of Americus is not an unlawful arrest. It is his duty to arrest all such people, and to arrest them at once, and that, too, without a warrant. If the citizen is guilty of disorderly conduct, and a policeman arrest him, he cannot complain, and has no right of action against the officer who makes the arrest. Such an arrest and detention in the guard house until the Mayor's Court meets the next day, is not an unlawful detention, and no right of action accrues to the person who is thus arrested and detained. If Johnson, the plaintiff, was within the city limits and engaged in disorderly conduct, such as dragging a woman in the street, and the policeman arrested him and confined him in the guard house during the night, the defendants are not liable in damages to Johnson, inasmuch as they were discharging their duties in accordance with the law, and the ordinance of the City Council and the charter of the city was the law that the policemen were bound to obey. If, when they sought to arrest him, Johnson drew his pistol and put himself in a posture of defense, he was also guilty of violating an ordinance of the city for resisting an officer. If Johnson, or being arraigned the next day, pleaded guilty to the charge of disorderly conduct, the plea of guilty is *prima facie* evidence of his guilt, and remains such until he proves that he was

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not guilty. If he pleaded guilty, it was the right and duty of the Mayor, under the law, to impose a fine on him of not more than ten dollars, and in the discharge of that duty the Mayor and City Council are not liable.

"If the plaintiff, Johnson, was not guilty of disorderly conduct or of violating any ordinance of the City Council, and the policemen arrested him without cause, then they and the City Council are liable in damages: Code, sections 3010, 3011, 3012. But if he was disorderly at the time of arrest, he has no right of action and you must find for the defendants."

The jury returned a verdict for the defendants, whereupon plaintiff excepted upon the following grounds, to-wit:

1st. Because the Court erred in the ruling as to the competency of the jurors, who lived within the corporate limits of said city.

2d. Because the Court erred in refusing to charge as requested.

3d. Because the Court erred in the charge as given.

C. T. GOODE, for plaintiff in error.

FORT & HOLLIS, for defendant.

WARNER, Chief Justice.

This was an action of trespass *vi et armis*, brought by the plaintiff against the defendants, to recover damages for an alleged false imprisonment. On the trial of the case the jury found a verdict for the defendants. Exceptions were taken to the rulings and charge of the Court, as specified and set forth in the record, which are assigned as error here. It appears, from the evidence in the record, that the plaintiff was arrested in the city of Americus for disorderly conduct, in violation of the ordinances of the city. The arrest was made by Lee and Wheeler, (who were acting as policemen

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under the authority of the City Council,) about sundown on the 9th day of June, 1870, without any written warrant and the plaintiff was confined in the guard-house of the city until ten o'clock next morning, when he was brought before the Mayor, and he pleaded guilty to the charge against him, and was fined \$10. The main question in the case is, whether the defendants were protected in making the arrest of the plaintiff and confining him in the guard-house under the provisions of the charter of incorporation and the ordinances of the city of Americus. The twentieth and twenty-sixth sections of the Act of Incorporation confer the power and authority on the Mayor and City Council of the city of Americus to enact the ordinances under the authority of which the plaintiff was arrested. But it is said the Act of Incorporation and the ordinances are unconstitutional because they authorize the arrest to be made without a written warrant or process. The Code authorizes an arrest to be made by an officer or a private person, without a warrant, when the offense is committed in his presence, and there is likely to be a failure of justice for want of an officer to issue warrant: Code, sections 4626, 4627. The provisions of the Code upon this subject is nothing more than the affirmation of the principles of the common law: 4th Bl. Com 292. In every case of an arrest without warrant, the person arresting should, without unreasonable delay, convey the offender before the most convenient officer authorized to receive an affidavit and issue a warrant, and the imprisonment of the offender beyond a *reasonable* time allowed for this purpose would not be legal: Code, section 4628. The Act of Incorporation empowers the Mayor and City Council to establish and regulate a city guard, who shall have the right to take up all disorderly persons and all persons committing or attempting to commit any crime, and to commit them to the guard-house to await their trial the next day. By the twenty-eighth section of the ordinances of the city it is made the duty of the marshal, deputy marshal and policemen to preserve order in the city, to suppress all affrays and

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riots, to arrest all drunken, disorderly or riotous persons who are disturbing the peace and quiet of the city, and commit them to the guard-house or bring them before the Mayor to be dealt with as the evidence produced shall warrant. In the opinion of the General Assembly, in conferring the power upon the Mayor and Council of the city of Americus to pass the ordinance under which the plaintiff was arrested, his arrest and detention in the guard-house without a warrant until the next day to await his trial, was not an *unreasonable* delay in bringing the offender before the proper officer for a hearing. Construing the Constitution in the light of the common law in regard to arrests without a warrant, the Act of the General Assembly conferring the power upon the City Council, or the ordinances thereof now complained of, are not unconstitutional. The arrest and detention of the plaintiff without a written warrant until the next day for a hearing of his case before the Mayor, under the statement of facts disclosed in the record, was not illegal. Whilst it is the duty of the Courts to protect the liberty of the citizen, it is also the duty of the Courts to protect society against the wanton and illegal exercise of that liberty.

The plaintiff at the trial objected to those of the jurors included in the panel of twenty-four who resided within the corporate limits of the city of Americus, for cause, as being incompetent jurors to try the case. The objection was overruled and the plaintiff excepted. What number of the twenty-four resided within the city limits, or whether they were all stricken by the plaintiff in selecting the jury, the record does not inform us. According to the ruling of this Court in the case of *The Mayor of Columbus vs. Goetchius*, 7th Georgia Reports, 139, the jurors who resided within the corporate limits of the city were incompetent jurors, and it was error in the Court in overruling the objection to them. But, in our judgment, inasmuch as the verdict of the jury in this case was right, both under the law and the facts of the case, and a different verdict should not have been rendered by any jury, we will not reverse the judgment of the Court below on

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the ground of the objection to a portion of the jury men constituting the panel of twenty-four, nor for any mere technical errors in the charge of the Court.

Let the judgment of the Court below be affirmed.

DAVID A. NEWSON, Ordinary, *et al.*, plaintiffs in error, *vs.*
THOMAS M. STARKE, administrator, *et al.*, defendants in
in error.

1. Under the Revised Code of this State, our Courts of chancery have jurisdiction to carry into effect charitable bequests, the objects of which are definite and specific, and capable of being executed.
2. In determining what bequests for charitable purposes are definite and specific and capable of being executed, the Court is to be guided by the well settled rules of the Court of chancery in England in the exercise of its inherent chancery jurisdiction over charities as distinguished from its jurisdiction as the agent of the king in the exercise of his prerogative power to direct and give effect to indefinite charitable bequests.
3. A bequest to the Inferior Court of a county of a sum of money to be placed in the hands of four men, who are to give bond and security, whose duty it shall be to loan out said amount and pay over the interest annually to the Inferior Court, to pay for the education of poor children belonging to the county, and providing that no part of the principal shall be used for that purpose, is, according to the well settled rules for the exercise of the inherent power of a Court of chancery over charities, sufficiently definite and specific in its objects and sufficiently capable of execution to authorize and require our Courts of chancery to give it effect.
4. It is the duty of the Inferior Court, on its acceptance of the trust, in such case, to appropriate the money, as directed, and if any difficulties arise, or any uncertainties exist, as to the precise objects, or as to the mode of applying the fund, to apply to the Chancellor, who will direct, by decree, the leading details of the scheme to be adopted.

Equity. Charitable bequest. Before Judge ROBINSON.
Greene Superior Court. March Term, 1872.

William B. Bowen, as assignee of Reuben Allison, Thomas
M. Stark, administrator of John Allison, Jesse Allison and

Martha Allison, executrix of David Allison, filed their bill containing suustantially the following allegations : That on April 29th, 1865, Gwyn Allison made his last will and testament and died soon thereafter, during the same year ; that William L. Strain was qualified as executor of said will on the 4th day of September, 1865, and proceeded forthwith to execute the same ; that the tenth item of said will is as follows, to-wit :

"I give and bequeath to the Inferior Court of Greene county \$20,000, to be placed in the hands of four men, who are to give bond and security, whose duty it shall be to loan out said amount and pay over annually to the Inferior Court the interest, to pay for the education of poor children belonging to said county, and that no part of the principal is to be used for that purpose."

That complainants are legatees under said will ; that on account of the emancipation of the slave property of testator, all the pecuniary legacies had to abate equally ; that under said tenth item said executor did, on June 2d, 1868, pay over to the Inferior Court of said county \$3,000, and on the 13th day of the same month and year said Court passed an order turning over said sum of money to John C. Palmer, Lewis B. Willis, George C. Davis and Wiley B. Johnson, on their complying with the requirements of said will ; said defendants gave the required bond, and on the day and year aforesaid received from said Inferior Court \$2,952 32 ; that on October 3d, 1870, said defendants were paid from the same source an additional sum of \$1,633, making in all \$4,585 30 received by them under said tenth item. Complainants charge that said item is void for uncertainty both as to its subjects and objects, void as to its subjects, as it is impossible to determine, from said will, or otherwise, who were intended by testator to be the beneficiaries of the legacy, what poor children of the county were meant, or who testator designated as poor children ; that even if it could be ascertained with sufficient certainty who are the poor children of the county according to testator's intention, it

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would still be uncertain what number and which ones of said poor children he intended to participate in this fund, as he does not say in said item all the poor children of the county, but simply "poor children belonging to said county; that said item is void as to its objects because it cannot be ascertained by any Court what amount of education testator wished these poor children to have, at what ages they were to receive it, and at what kind of schools; complainant charges that the Ordinary of said county, the successor of the Inferior Court, has received the interest annually from said four men. Prayer: that said tenth item of said will be decreed to be null and void for the reasons aforesaid; that said John C. Palmer, Lewis B. Willis, George C. Davis and Wiley B. Johnson be decreed to pay over to complainant with the other legatees under said will, the amount that they have received under the provisions of said tenth item together with all interest not paid heretofore to the Ordinary that said David A. Newson, Ordinary, be decreed to pay over to complainants and the other legatees the interest that he has received on said sum of money; that said William L. Strain be decreed to account with complainants for the balance of said estate which he may have in his hands; that the writ of subpoena may issue.

The defendants demurred to said bill.

William L. Strain, executor of Gwyn Allison, having died pending the litigation, James L. Brown, *administrator bonis non, cum testamento annexo*, was made a party.

The demurrer was overruled by the Court, and defendants excepted and assign said ruling as error.

REESE & REFSE, for plaintiffs in error. The defendants in error rely on 21st Ga. R., 21, and 25th, 439. The legislation of the State has since materially affected said decisions: 4th Wheaton, 1; 9th Howard, 55; 17th *Ill.* 369; 3d Cranch C. C. R., 269; 17th Searg. & Rawle 88; 4th Dana, 354; 2d Iredell, 255; *Ib.*, 210; 4th G. R., 404; Code, secs. 2432, 3098, 3099. Who constitute

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the poor in 1865? Code, secs. 785, 1300. Elementary branches and rates of tuition: Code, secs. 1287, 1288. Construction of will: 9th Peters, 483.

M. W. LEWIS; J. A. BILLUPS; H. D. McDANIEL, for defendants. 1st. No provision indicated for support of the beneficiaries: 25th Ga., 430; Jar. on Wills, 333; 3d Cranch C. C. R., 269; 4th Am. L. R., 526. 2d. Jurisdiction of Chancery in Georgia over charitable bequests limited to such as are definite and specific: Code, sections 2432, 3098, 3099; 25th Georgia Reports, 430; 18th *Ibid.*, 130; 4th *Ibid.*, 427. Cy-pres doctrine: 2d Story Eq. Ju., 1159, 1160, 1187, *et seq.*; 4th Kent's Coms., 508; 4th Wheaton, 1; 9th Howard, 55; 17th, 369; 3d Cranch C. C. R., 269; Brightley's Rep., 346.

McCAY, Judge.

Were the law of Georgia on the subject of charitable bequests precisely as it was when the case of *Beall vs. Drane*, 25th Georgia, 430, was decided by a majority of this Court, we should feel greatly embarrassed by that decision. As we shall hereafter show, the principles of that decision would deny to Courts of chancery in this State any other jurisdiction over charitable bequests than they have over ordinary trusts. Indeed the decision in Maryland, (5th Harr. & John. R., 392,) which is the only case referred to fully sustaining the conclusion at which the majority of our Court arrived, was put by the Maryland Court expressly upon that ground. If this be so, the case in 25th Georgia would seem to be directly contrary to the unanimous decision of this Court in the Fox will case, decided in 4th Georgia Reports, 404, where it was held that the principles of the statute 43d Elizabeth are of force in this State, and where a bequest was enforced which was utterly void, as too uncertain for judicial action, unless jurisdiction over it was taken by virtue of the special jurisdiction of Courts of chancery over charitable bequests. But whatever may have

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been the state of the law at the date of the hearing of the Beall will case, it cannot be doubted that, under the Revised Code of this State, our Courts do have a special jurisdiction to *carry into effect* charitable bequests. Sections 3099 and 2432 declare the doctrine of *Cy-pres*—the most striking feature of the special jurisdiction over charities—to be the power of our Courts. Section 3100 defines what are charitable subjects, and in so doing almost copies the statute of 143d Elizabeth. And section 3103 goes further than was usual even in the English Courts by allowing parol evidence to explain and give point to bequests coming within the class defined as charitable. It is true, that section 3098, which in general terms declares the jurisdiction, uses the words, “where the same are definite and specific in their objects and capable of being executed,” but as we shall hereafter show, to give these words the confined and limited meaning contended for by the defendant in error, or even as suggested by the majority of the Court in the Beall will case, would be to ignore the whole history of the law upon this subject and impute to the framers of the Code the folly of conferring a jurisdiction over charitable bequests, and in the very words conveying denying it altogether.

The right of a testator to make *any* definite and specific bequest, and for any definite purpose not contrary to law or public policy, has never been denied by any Court. That the gift is to one person or to a thousand is immaterial—that it is for one purpose or another can make no difference, if the purpose be not illegal. A Court of law or of equity, accordingly, as it is within the jurisdiction of either, would always enforce it, if it were *definite* and *specific* in its objects and the legatees were distinctly pointed out. The ordinary powers of either Court in settling disputes of suitors are abundant for this purpose. A bequest, for instance, to the great-grandchildren of A, who died in 1800, to be equally divided between them, might be a bequest to a large number of people, but the proper Court, if the amount of the legacy were certain, would have no want of power to enforce it, but

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cause the objects of the testator's bounty are definitely and specifically pointed out and capable of exact ascertainment. Nor would it make any difference that the motives of the testator were his kinship to said grandchildren, or charity for them, or whether they were poor or rich.

The special chancery jurisdiction over charitable bequests grows out of the rule that, in cases of private right, Courts will not enforce uncertainties, and that the parties at interest must be capable of definite ascertainment. It is of the very nature of a charity that this is impossible, and from the most ancient times Courts of chancery in England have applied very different rules in determining the validity of charitable bequests from the rules applied to such as were not charitable. A less degree of certainty as to the objects of the bequest, and as to the mode of its application has been required than was requisite in other bequests. It is of the very essence of a charitable bequest that the objects to be benefited shall be to some extent indefinite. Mr. Justice Grey, in *Jackson vs. Philips*, 14th Allen, 556, gives the following as the definition of a charity so far as the objects of it are concerned: "A charity in a legal sense may be more fully defined as a gift to be applied (consistently with existing laws) for the benefit of an *indefinite* number of persons." And in *Fontaine vs. Ravenel*, 17th Howard, 384, Judge McLean, in delivering the opinion of the Court, says: "It is no *charity* to give to a friend. In the books it is said that the thing becomes a charity when the *uncertainty* of the recipient begins." And in *Salstonsal vs. Sanders*, 11th Allen, 456, the Court says: "It is the number and *indefiniteness* of the objects which is the essential element of a charity." And this for the very simple reason that if the amount be certain, and the persons to take be certain, the bequest has nothing in it outside of the ordinary jurisdiction of Courts of chancery over trusts or of Courts of law over legacies: *Blanford vs. Fackerell*, 4 Brown Chan., 394, 1 John, 612; *Liley vs. Huy*, 1 Hare, 580.

It follows, therefore, that when the framers of our Code

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declared our Courts of chancery to have jurisdiction to enforce charitable bequests, declared what were charities and recognized the doctrine of *Cy-pres*, they intended to do something more than that Courts of equity could enforce trusts. There was no propriety in giving this special jurisdiction if a bequest, for charitable purposes, to be valid must have the same certainty and definiteness as to its object and mode of division, as bequests, not for charitable purposes. There was no reason for defining charitable purposes if bequests of that character must have the same definiteness and certainty as bequests for other purposes. Since nobody for a moment ever supposed there was any trouble in enforcing a definite and specific bequest simply because the testator's motives for making it were charitable. All bequests are charities, in so far as they are without consideration. They are bounties, gifts, and dependent upon the simple will of the testator. It seems, therefore, incontestable that the words "definite and specific," used in this section of the Code are to be understood in connection with the other words used, to-wit: "charitable bequests." Since to give them the same meaning as though they were used in connection with other bequests would be to make the law absurd.

We are, therefore, to look for the proper meaning of the words to the fathers of the law; we are to go for the proper sense of them, when applied to charitable bequests, to the English Chancery Decisions, as provided by section 304 of the Code. There were, according to these decisions, two classes of charitable bequests, to-wit: bequests to "charities" indefinitely, or for "religion" or "pious uses" indefinitely, or for "education" and other bequests; when, though there was a clearly expressed charitable intention, there was a total want of any special objects, and a total failure to fix the means by which the objects should be pointed out or the fund applied. In such cases, Courts of chancery in England and such, had no power to carry them into effect. The charity was not, however, allowed to fail. The king, under the sign manual, declared the objects and pointed the mode

application, or the Lord Chancellor, not as a Judge but *instead of* the king, did the same: 1 Jarman on Wills, 224. See, also, Perry on Trusts, section 729, and the cases cited. But if the general objects of the bequest were pointed out, or if the testator had fixed any means for doing so, as by the appointment of trustees for such purpose, Courts of chancery treated the bequest as one sufficiently definite and specific for judicial cognizance and carried it into effect, notwithstanding there might remain some indefiniteness and uncertainty. The Chancellor referred the case to the Master to devise a scheme by which any *such* uncertainties should be determined. Thus a gift to "the poor": Legge *vs.* Asgill, Turn & Russ., 265; 49 Maine, 288; to a particular parish or place: 9 Allen; 2 Sanford's Chancery, 46; 2 Iredell's Equity, 210; 13 Allen, 474; 1 Beav., 370; 5 Beav., 289; or to the widows and orphans of a parish; 2 Sim. & G., 93; or a gift to a church to be laid out in bread for the poor: 17 Sergeant & Rawle, 88; were all held good. The distinction would seem to be this: If the bequest be to charity generally, or to religion and education generally, the jurisdiction was not in the Court, as such, to carry into effect; but if the objects of the gift were stated, though only generally, or if there were a trustee appointed, the Court would supply the want of definiteness in the object or would compel the trustee to carry out the general intent of the testator: See Perry on Trusts, sec. 719.

Assuming, therefore, that by the words "definite and specific" our Code means such as by the usual practice in Chancery Courts are held to be "definite and specific," we think the words of this bequest come within the rule. Here is a trustee, and here are the objects—the Inferior Court and the poor children of Greene county. It is true there is some indefiniteness in the objects, since the word *poor* and the word *children* are both to some extent indefinite. But as we have seen, if *such* an indefiniteness is to make the bequest illegal for want of certainty, then all charities must fail, since, in the very nature of them, *this* kind of indefiniteness must exist. An examination of the authorities will, however, clearly

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show that such a bequest as this has uniformly been held to be sufficiently certain for the exercise of that peculiar diction which the Courts of chancery, as such, under exercise over charitable bequests: See Story's Equities 1164-5; Hill on Trustees, 81, 128, 452; Pe Trusts, 719 *et seq.*; Vidal vs. Gerard's executors, 2 127; 7 B. Monroe, 611; Williams vs. Pearson, 38 Al. 299.

Without doubt there has been, until within a few years, some confusion in the minds of even Judges upon this subject. It has been sometimes supposed that the jurisdiction of Chancery in England over this subject was only a branch of the King's prerogative and not a judicial function at all, and again it has been thought that the peculiar diction was wholly derived from the 43d Elizabeth. It is now well settled that it is only that branch of the jurisdiction which undertakes to carry into effect charities generally where there are no trustees, which is prerogative, and when trustees are appointed, or where the objects of the charity are pointed out, even generally, then the Court acts by its inherent power over trusts; but from the nature of the subject-matter it does not require the same degree of definiteness and certainty as it would if the bequest were not charitable: See Perry on Trusts, sections 690, 748.

We see no difficulty in the Inferior Court of Greene devising a scheme, in accordance with the manifest intention of the testator, and carrying it out faithfully. If the devise should fail or should itself need judicial aid, the Court of Chancery has power here to appoint a Master to devise a proper scheme for carrying the bequest into effect.

Judgment reversed.

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Clark vs. Thurmond.

JOHN C. CLARK and SUSAN J. CLARK, plaintiffs in error,
vs. JESSE M. THURMOND, defendant in error.

An award having been made the judgment of the Court without objection, equity will not interfere to set it aside on account of fraud in the original cause of action, or of fraud in obtaining the complainant's consent to the arbitration, where all the facts were known at the time of the motion to make the award the judgment of the Court. (R.)

Res adjudicata. Before Judge KNIGHT. Lumpkin Superior Court. April Term, 1872.

Jesse M. Thurmond filed his bill containing substantially the following allegations: That he is the owner of a certain tract of land and of certain personalty situated in the county of Lumpkin; that he has heretofore been subject to the use of intoxicating liquors; that John C. and Susan J. Clark, knowing his infirmity in this respect, and intending to injure and defraud him, did, on the ... day of October, 1869, by artful and unlawful means, induce him to become drunk, so that he was wholly incapacitated to attend to business, and whilst he was in this condition, obtained a deed from him to said land, and also some pretended evidence that he had sold to them the aforesaid personalty, which pretended conveyances were based upon no consideration whatever; that John C. and Susan J. Clark, for the purpose of giving semblance of right to said illegal transaction, by the same artful means aforesaid, procured his consent to arbitrate the questions in dispute with respect to said property, and that an arbitration was had and an award rendered against him, to which award he intended to file his exceptions, on the ground that said award was illegal for the reason that the aforesaid conveyances were obtained upon no consideration, and by the fraudulent means already set forth; that said award was made the judgment of the Court by the false representations of John C. and Susan J. Clark that he was fully satisfied with said award and judgment; that he remained in possession of said property and is still in the possession of the same, but that

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John C. and Susan J. Clark, with divers other persons, came to his house and threatened to eject him and his family, together with all of his property, unless he would acknowledge himself the tenant of said Susan J. Clark and pay to her rent that he signed said acknowledgment under the aforesaid address; that under the aforesaid fraudulent claims, said John C. and Susan J. Clark went into the corn field and took away one hundred bushels, more or less, of his corn, of the value of seventy-five cents per bushel, for which he prays an account; that he prays the writ of injunction may issue restraining John C. and Susan J. Clark from any and further disturbance or interference with his free use, possession and enjoyment of said property and the rents, issues and profits thereof; prays further that all deeds and bills of sale may be declared null and void; that said lands and tenements be decreed his property, together with the rents, issues and profits; that said award and judgment be annulled and set aside; that the personalty be decreed his property; that said attornment be declared null and void; that the writ subpœna may issue.

To this bill plaintiffs in error demurred, which demurrer was overruled, and said judgment is assigned as error.

R. A. QUILLIAN, for plaintiffs in error.

WIER BOYD, for defendant.

WARNER, Chief Justice.

This was a bill filed by the complainant against the defendants to set aside an award. The defendants demurred to the bill, which the Court overruled, and the defendants excepted. The award of the arbitrators was made the judgment of the Superior Court, and according to the repeated rulings of the Court the allegations in the complainant's bill are not sufficient to authorize a Court of equity to interfere and set aside that judgment.

Let the judgment of the Court below be reversed.

JOHN D. FIELD *et al.*, plaintiffs in error, vs. MARTHA C. MARTIN, administratrix, defendant in error.

Where F. and N. purchased land jointly from M., giving their notes for the purchase money and taking his bond for titles, and F. paid the whole of the purchase money, and N. having died, F. demanded the titles to be made to himself, and brought suit on the bond in the names of F. and N. for F.'s use :

Held, That as the purchase was joint and the bond joint, it was no breach of the bond to refuse to make titles to F. alone.

Held, further, That the suit could not be maintained in the name of F. and N. for the use of F., N. being dead.

Complaint on bond for title. Breach. Party. Before Judge KNIGHT. Lumpkin Superior Court. April Term, 1872.

John D. Field, Jr., suing for himself and David Nichols, for the use of John D. Field, Jr., brought complaint against Martha C. Martin, as administratrix upon the estate of William Martin, deceased, upon a bond for title made by William Martin on November 6th, 1847, obligating himself in the sum of three hundred dollars to John D. Field, Jr., and David Nichols, conditioned to make title to certain land, on the payment of certain notes for the purchase money.

The defendant pleaded the general issue, statute of limitations, set-off, release and former judgment.

It appeared, from the evidence, that John D. Field, Jr., had paid the purchase money for the property set forth in the bond and had demanded of defendant a deed ; that David Nichols was drowned in 1851 or 1852.

The jury returned a verdict for the plaintiffs.

The defendant moved for a new trial upon the following amongst other grounds :

"Because the Court erred in refusing defendant's motion to dismiss the action on the ground that David Nichols was dead at the commencement of the suit."

The Court set aside the verdict and ordered a new trial ;

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whereupon plaintiffs in error excepted and assigns said decision as error.

R. A. QUILLIAN ; WIER BOYD, for plaintiffs in error.

H. P. BELL, for defendant.

McCAY, Judge.

The purchase of this land by Field and Nichols from Martin was a joint purchase, according to the bond and note, and there is nothing in the evidence to contradict this. As soon as the papers were executed, the vendees became jointly interested in the land, according to the bargain. That one of them has paid all the money does not alter their relative legal rights to the land. The bond was to both, the obligation to make the title is to both, and a title to one would not have been a compliance with the obligation of the bond. This was what was demanded by Field, and this is what the defendant refused to perform. There was no proof of a breach of the bond. The demand of Field was not in accordance with its terms, and a compliance with the demand would have left the obligor subject to an action on the part of Nichols or his representatives.

We will not say that Field may not, as survivor, bring an action on the bond, but he must show a breach of the bond—to-wit: a refusal to make titles according to its terms, or show some consent or agreement, on the part of Nichols, that a title to Field, alone, will satisfy the bond.

Very clearly, this case cannot go on in Nichols' name if he be dead. If his name is important for any purpose and he be dead, the suit cannot go to judgment. A dead man cannot be a party to a suit.

Judgment affirmed.



Groover *et al.* vs. King.

NANCY GROOVER *et al.*, plaintiffs in error, vs. JAMES KING,
defendant in error.

1. A paper, signed by the Ordinary, purporting to grant to an administrator leave to sell the land of the estate which he represented, which had never been recorded or entered on the minutes of the Court, and without proof that such order had been granted, at a regular term of the Court of Ordinary, is inadmissible in evidence. (R.)
2. The recital in an administrator's deed, executed on the 3d day of December, 1861, that leave to sell the land was granted in November last past, is notice to the purchaser that the requirement of the law, as to forty days' public notice of the sale, had not been complied with. (R.)
3. Although the minor heirs of the intestate may have had a guardian who receipted to the administrator for their portion of the proceeds of the land, without any knowledge of the illegality of the sale, yet they were not estopped from asserting their claim to the land, when they obtained a knowledge of such illegal sale, they accounting for the money received. (R.)
4. Estoppels are not favored by the Courts. (R.)

Order for sale of land from Court of Ordinary. Notice. Administrator's sale. Recitals in deed. Estoppel. Before Judge ALEXANDER. Brooks Superior Court. May Term, 1871.

Nancy Groover, widow of Josiah Groover, deceased, Richard D. Harris and his wife Charlotte, formerly Charlotte Groover, and daughter of said Josiah Groover, deceased, James M. Rushin and Julia his wife, daughter of said Josiah, Axon J. Moody and Frances his wife, daughter of said Josiah, Agnes Groover, Solomon Groover, Moses Groover, Josiah Groover, Ellen Groover, and Jane Groover, minor children of said Josiah Groover, deceased, filed their bill against James King containing substantially the following allegations: that Josiah Groover, died in November, 1850, leaving considerable real and personal estate; that Asa Kemp was appointed administrator upon the estate of said Josiah illegally, without notice, and when there was already a legally appointed administrator upon said estate; that said Kemp made application for leave to sell all the

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real estate, as appears from a deed executed by said Kemp as administrator on December 3d, 1861, conveying to James King two lots of land situate in the fourteenth district of Brooks county, and known as lots numbers sixty-five and sixty-six, containing nine hundred and eighty acres, more or less, with the exception of forty acres of lot number sixty-five and thirty acres from lot number sixty-six; that said deed contains the following recital: "Whereas, the Ordinary of said county of Brooks did, at his Court, holden in the month of November last past, empower the said Asa Kemp, as administrator as aforesaid, to sell and dispose of the real estate of said Josiah Groover, deceased;" that the records of the Court of Ordinary fail to show any application for leave to sell, or any order authorizing the sale; that said Kemp illegally exposed said lots for sale, with other lots, one of which, to-wit: number twenty, in the fourteenth district, said administrator became the purchaser through one John A. McIntosh; that said pretended administrator did sell the two lots set forth in said deed to James King, who became the purchaser with the knowledge that said lands had not been advertised forty days as required by law after an order was passed granting leave to sell the same, if any such was passed; that said deed, bearing date December 3d, 1871, recites that said sale was effected "on the first Tuesday of this present month;" that said James King purchased said land and received said deed with the fact appearing upon the face of the same; that forty days' notice could not have been, and was not given of the sale; that said James King gave his notes for said land, and finding them in the possession of Nancy Groover, guardian of the minor children of said Josiah Groover, deceased, by intimidation and fraud operating upon her fears, through the assistance of other having an undue influence over her, induced her to take spurious money, or that which was really worthless, stating if she did not she would get nothing; that said King has twice before, in the year 1864, applied to said Nancy Groover to take said spurious money, which she refused; that after

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ward King brought one Joshua Groover, in whom said Nancy had great confidence, to see her, and they together represented to her that, it was best to take the Confederate money; that this interview was in the latter part of 1864 or first of 1865; that said Nancy Groover, under these fraudulent representations, received the money, and still has the same in her possession. Prayer: that James King be enjoined from selling said land or from encumbering the same, and from committing waste; that a Receiver be appointed to take charge of the said land and to receive the rents, issues and profits thereof; that King may account for waste committed, and for the rents, issues and profits; that said deed from Asa Kemp, administrator to said King, may be decreed to be delivered up and canceled as fraudulent, illegal and void, or that said King be decreed to pay the purchase money as mentioned in said deed, with interest thereon; that King be compelled to deliver up the possession of said land.

The defendant, James King, answered the bill substantially as follows: that James M. Rushin was the first administrator of said Josiah Groover, deceased; that said administrator advertised notice of application for leave to sell said land in the Thomasville Enterprise, the proper gazette for that purpose, on April 15th, 1861; that the leave to sell was considered as granted, as none of the complainants or of the creditors of said Josiah, deceased, interposed objections; that the formal order was not drawn up until it was called for at the ensuing November Term of said Court of Ordinary; that the formal order was dated November 4th, 1861; that said James M. Rushin proceeded, on October 16th, 1861, to publish notice of the sale of said lands; that the aforesaid notices and orders of the Ordinary were had at the instance of said James M. Rushin, one of the complainants; that said James M. Rushin applied for letters of dismission on July 24th, 1861, and that notice was given to all persons concerned to show cause to the contrary on the first Monday in October, 1861; that said Asa Kemp, on the said July 24th,

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1861, applied for letters of administration on said estate, as successor of said Rushin, of which application notice was duly published; that said Rushin was duly dismissed and said Kemp appointed; that said appointment was made by the express assent of complainants; that the order for the sale of lands, granted to Rushin while administrator, enured to Kemp, as his successor, by operation of law; that the notice given by said Rushin of said sale was sufficient in law for the sale by Kemp; that said sale did take place on the first Tuesday in December, 1861, and defendant became the purchaser of lots sixty-five and sixty-six, with certain exceptions, as set forth in the bill, at the price of \$9,121, which, at the time of the sale, was regarded as a very large price; that defendant denies that there was any violation of law by the said Kemp in the said sale, and that he had any notice whatsoever of any illegal step taken, or any irregularity committed by said Kemp in said sale, whether appearing upon the face of said deed or otherwise, but that defendant purchased in good faith; that Nancy Groover, one of the complainants, and others purchased at said sale, without any question as to its legality; that said sale took place during the late war, when there was great confusion and interruption in the Courts of the country and it would be contrary to public policy and disastrous to the country to hold that any irregularity would vitiate the sale; that defendant took possession and made large improvements thereon to the value of \$3,000, or other large sum that defendant has been in continuous possession more than seven years, relying upon said title, as was well known to complainants; that no waste has been committed, but, on the contrary, the improvements have largely enhanced the value of said lands; that defendant gave his notes for the purchase money in sums of \$1,000, with personal security; that one of said notes was delivered by said Kemp to R. D. Harris one of the complainants, who received it as his part of the proceeds of said estate, and that defendant has paid said note to said Harris in full, and that said Harris has no further claim upon him or upon said lands; that another of said

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tes was paid by Kemp to James M. Rushin, one of the complainants, who received it as his distributive portion, which said note defendant has paid in full, and said Rushin has no further claim upon defendant or upon the land; that defendant found his other notes in the possession of said Nancy Groover, one of the complainants, and insists that, having accepted said notes from said Kemp, thereby ratifying said sale, and cannot now deny its legality; that defendant denies any and all manner of intimidation and fraudulent practices operating upon the fears of said Nancy Groover to induce her consent to his paying said notes, but, on the contrary, alleges that she accepted payment of said notes voluntarily and deliberately, and that defendant took Joshua Groover to her house at the time of said payment solely for the purpose of having said Joshua calculate the interest on said notes, and any advice given by said Joshua to said Nancy was not at the instance or procurement of defendant; that defendant paid said Nancy all but one of said notes in Confederate money, when said currency could be used to purchase such property as was not scarce, by reason of the war, about as great an amount as could have been purchased in the currency of the country when said sale took place, at any time since the war; that defendant procured a portion of said money by selling his cotton at twelve cents per pound, for the purpose of paying said notes; that Confederate money, at the time of the payment aforesaid, was the currency in the country, and universally received in satisfaction of debts contracted before or during the said war; that said currency was, by law, then receivable in payment of debts due to administrators, executors and guardians, and payments made to such trustees during the war have been confirmed by the Legislature; that the last payment was made to said Nancy about or during the month of May, 1863, in currency, as stated, and by the substitution of a note made by one Willis A. King for \$1,000, and indorsed by this defendant, which note was long since paid by said King; that the said notes had not been paid, they would be subject to

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the Act entitled an Act for the relief of debtors, etc., an defendant insists upon the benefit of said Act; that on th day of, 18..., said Asa Kemp made his return of a full and final settlement with the distributees of said estate to the Court of Ordinary of said county, and applied for letters of dismission from the said administration; that notice of such application was published in terms of the law, and that no objections were filed by any of said parties, or any person whatever, either to the final settlement or to the application for letters of dismission, and that, at the January Term, 1864, of said Court of Ordinary, said Kemp was duly dismissed from said administration.

Upon the trial, under the charge of the Court, the jury returned a verdict for the defendant. The complainants moved for a new trial, upon the following grounds, to-wit:

1st. Because the jury found contrary to law.

2d. Because the jury found contrary to the evidence.

3d. Because the verdict of the jury is decidedly and strongly against the weight of evidence.

4th. Because the Court erred in allowing defendant to put in evidence the letters of administration of Asa Kemp, when it appeared from the minutes of the Court of Ordinary of said county of Brooks that there was no order of said Court of Ordinary dismissing James M. Rushin, a former administrator, and no order on said minutes appointing said Kemp administrator.

5th. Because the Court erred in allowing defendant to put in evidence what purported to be an order for the sale of the land, brought into Court by defendant, and which had never been recorded, had no seal, and without evidence that it had been passed in term time; when no such order appeared on the minutes of the Court of Ordinary, the same not being a certified copy of any order, and upon the statement of the witness, Kemp, that the order had been written by the Ordinary in 1861, on November 4th, and had been retained by him until after the suit was commenced in 1869.

6th. Because the Court allowed the defendant to put in

ce the returns made by said Asa Kemp, when it did appear that he was ever legally appointed such administrator by an order of the Court of Ordinary of said county.

Because the Court failed to charge (counsel in arguing so requested,) "that if King bought with notice the sale was illegal, then he was a trustee for complainant and should account for the land to them in this suit."

Because the Court failed to charge the jury, "that if King had notice in any way, by the deed or otherwise, that the sale was not made in the manner prescribed by law, that King held no title to defendant."

Because the Court erred in charging, "that the Court presumed to have discharged his duty in issuing orders of administration to Asa Kemp, though such presumption might be rebutted by proof," when it appeared by the minutes of the Court of Ordinary that no order had ever been issued appointing said Kemp administrator.

Because the Court charged "that a receipt in full of the distributive share of the estate, including the proceeds of land sold by the administrator and specifically returned to the Court of Ordinary, and the deed recorded in the proper county within the twelve months, will estop the heirs-at-law from setting up title adverse to the title of the purchaser, especially where the heirs were of full age at the time of the sale, and the administrator had been discharged from the trust, under a decree issued and published for the purpose."

Because the Court erred in charging, "that if the defendant had a guardian at the time, they were estopped."

Because the Court failed to charge, "that if the plaintiff's guardian had no notice of the want of legal authority to sell the land by the administrator at the time of the sale, then the plaintiffs were not estopped."

Because the Court erred in charging, "that if the representations of the defendant related to facts, and they were true, that there was fraud; but if the representations related to mere opinions, of which both parties could judge,

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although those opinions might afterwards prove to be incorrect, then there was no fraud."

All the facts necessary to a clear understanding of the decision of the Court are embraced in the bill, answer and petition for a new trial, without an insertion of the evidence.

The motion for a new trial was overruled and complainants excepted, assigning said ruling as error upon each of grounds aforesaid.

A. T. McINTYRE; HUNTER & MCCALL; JAMES L. STARD, for plaintiffs in error.

HANSELL & HANSELL; H. G. TURNER; S. S. KINBURY, for defendant.

WARNER, Chief Justice.

This was a bill filed by the complainants against the defendant to set aside a sale of certain described lands purchased by the defendant at an administrator's sale on the day of December, 1861. On the trial of the case the jury found a verdict for the defendant. A motion was made for a new trial on the several grounds specified in the record. The Court overruled the motion, and the complainants excepted. Whether the letters of administration of Kerney offered in evidence, which were issued to him by the Ordinary upon the resignation of Rushin, could be *collaterally* attacked upon the ground set forth in the fourth assignment of error, this Court is not prepared to deliver an unanimous judgment, and we, therefore, express no opinion in relation to that question. In our judgment, the Court erred in admitting in evidence the paper signed by the Ordinary purporting to grant leave to sell the land, brought into Court by the defendant, which had never been recorded, or entered on the minutes of the Court, and without evidence that such an order for the sale of the land had been granted by

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of Ordinary at a regular term of the Court. This
trator's sale, as well as the other proceedings in rela-
reto, took place prior to the adoption of the Code,
st be controlled by the then existing law. The
section of the Act of 1852 declares that no order for
of real estate shall be granted except at a regular
the Court of Ordinary. The action and proceedings
irt of record must be shown by its records; that is
est and best evidence of its action in relation to the
matter confided to its jurisdiction. It is not pre-
that the records of the Court of Ordinary of Brooks
have been lost or destroyed, and there is nothing
records of that Court which shows that an order
sale of the land in controversy was ever granted by
rt, which was an indispensable prerequisite to divest
of their title to the land and vest the same in the
it as a purchaser thereof at the administrator's sale.

of 1852 also declares that forty days' public notice
le of the land should have been given by the ad-
tor after leave had been granted by the Court of
r to sell it. The pretended order for the sale of the
ered in evidence in this case, is dated 4th of Novem-
1, and the sale took place on the first Tuesday in
r, 1861, twenty-nine days only after the pretended
the Court bears date. The deed made by the ad-
tor to the defendant recites that leave to sell the
granted in November last past, before the making
very of the deed to him, on the 3d day of December,
that the defendant had *notice*, on the face of his
at the requirement of the law, in that particular at
d not been complied with so as to make it a legal
d sale.

ugh the minor heirs of the intestate may have had a
, and that guardian may have receipted to the ad-
tor for their share of the proceeds of the sale of the
hout any knowledge of the illegality of the sale, as
euce in the record shows, they were not estopped

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although those opinions might afterwards prove to be incorrect, then there was no fraud."

All the facts necessary to a clear understanding of the decision of the Court are embraced in the bill, answer and motion for a new trial, without an insertion of the evidence.

The motion for a new trial was overruled and complainants excepted, assigning said ruling as error upon each of the grounds aforesaid.

A. T. MCINTYRE; HUNTER & MCCALL; JAMES L. SEWARD, for plaintiffs in error.

HANSELL & HANSELL; H. G. TURNER; S. S. KINGSBURY, for defendant.

WARNER, Chief Justice.

This was a bill filed by the complainants against the defendant to set aside a sale of certain described lands purchased by the defendant at an administrator's sale on the 21 day of December, 1861. On the trial of the case the jury found a verdict for the defendant. A motion was made for a new trial on the several grounds specified in the record. The Court overruled the motion, and the complainants excepted. Whether the letters of administration of KENNEDY offered in evidence, which were issued to him by the Ordinary upon the resignation of Rushin, could be *collateral* attacked upon the ground set forth in the fourth assignment of error, this Court is not prepared to deliver an unanimous judgment, and we, therefore, express no opinion in relation to that question. In our judgment, the Court erred in admitting in evidence the paper signed by the Ordinary purporting to grant leave to sell the land, brought into Court by the defendant, which had never been recorded, or entered on the minutes of the Court, and without evidence that such an order for the sale of the land had been granted by the

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Court of Ordinary at a regular term of the Court. This administrator's sale, as well as the other proceedings in relation thereto, took place prior to the adoption of the Code, and must be controlled by the then existing law. The seventh section of the Act of 1852 declares that no order for the sale of real estate shall be granted except at a regular term of the Court of Ordinary. The action and proceedings of a Court of record must be shown by its records; that is the highest and best evidence of its action in relation to the subject-matter confided to its jurisdiction. It is not pretended that the records of the Court of Ordinary of Brooks county have been lost or destroyed, and there is nothing upon the records of that Court which shows that an order for the sale of the land in controversy was ever granted by that Court, which was an indispensable prerequisite to divest the heirs of their title to the land and vest the same in the defendant as a purchaser thereof at the administrator's sale. The Act of 1852 also declares that forty days' public notice of the sale of the land should have been given by the administrator after leave had been granted by the Court of Ordinary to sell it. The pretended order for the sale of the land, offered in evidence in this case, is dated 4th of November, 1861, and the sale took place on the first Tuesday in December, 1861, twenty-nine days only after the pretended order of the Court bears date. The deed made by the administrator to the defendant recites that leave to sell the land was granted in November last past, before the making and delivery of the deed to him, on the 3d day of December, 1861, so that the defendant had *notice*, on the face of his deed, that the requirement of the law, in that particular at least, had not been complied with so as to make it a legal and valid sale.

Although the minor heirs of the intestate may have had a guardian, and that guardian may have receipted to the administrator for their share of the proceeds of the sale of the land without any knowledge of the illegality of the sale, as the evidence in the record shows, they were not estopped

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from asserting their claim to the land when they obtained knowledge of such illegal sale, and it was error in the Court to charge the jury that they were estopped. Estoppels are not generally favored by the Courts, and it would be a very harsh rule to establish that the minor heirs in this case were estopped when their guardian had no knowledge of the illegality of the sale of the land. But in electing to set aside the sale they must account for what they have received from the sale of the land: they cannot have the land and retain the proceeds of the sale thereof.

Let the judgment of the Court below be reversed and new trial ordered.

JOHN N. MONTGOMERY AND RUFUS M. MERONEY, executors, plaintiffs in error, vs. J. W. AND S. W. PRUITT *et al.* defendants in error.

It is not necessary that the declaration shall affirmatively show a case to be within the exceptions mentioned in the 14th section of the Act of October 18th, 1870, to excuse the filing of the affidavit required by the 12d section of the Act. It is sufficient, if the facts be made to appear to the Court by proof.

Relief Act of 1870. Exceptions. Before Judge DAVID CLARKE Superior Court. August Term, 1871.

John N. Montgomery and Rufus M. Meroney, as executors of Robert W. Pruitt, deceased, brought complaint against J. W. and S. W. Pruitt, principals, and T. A. Neal and V. B. Burns, securities, on a note made prior to June 1st, 1866 for \$6,000.

When the case was called, defendants moved to dismiss because no affidavit had been filed as to the payment of taxes under the Relief Act of 1870.

Counsel for plaintiffs stated that the note sued on belonged to a minor, who was the sole legatee, under the will of ROBERT W. PRUITT.

ert W. Pruitt, deceased, and offered to prove these facts to the Court.

The Court dismissed the suit, holding that, as the declaration failed to aver facts, bringing the case within the 14th section of the Relief Act of 1870, an affidavit as to the payment of taxes was necessary, to which decision plaintiffs in error excepted.

COBB, ERWIN & COBB, represented by THE REPORTER, for plaintiffs in error.

G. McMILLAN, for defendants.

McCAY, Judge.

This suit was pending in the name of the executors of Robert Pruitt. It is no alteration of the allegations to show that the persons entitled to the estate are minors. The cause of action remains the same—no new parties are introduced. The executor sues, avowedly, as the trustee of those entitled, whoever they may be. Nor is there anything in the Act of October 13th, 1870, to require what is there provided, in reference to the payment of taxes, to appear in the pleadings. Indeed, the very opposite would seem to follow, from the provisions of section 2d, that the defendant may make the investigation provided for without a plea. The rights of the parties are not involved. It is the public whose interest is intended by the statute to be protected, and there would seem to be no necessity to make a record of the proceeding for the protection of either.

We think the Court was wrong to require the amendment. It is sufficient to excuse the filing the affidavit, if the plaintiffs show, by proof, that the case is within the exceptions.

Judgment reversed.

Breed vs. Nagle.

ABEL D. BREED, lessee, plaintiff in error, vs. GUSTAVUS W
NAGLE, defendant in error.

1. Where there was a written contract by which a railroad company leased its property to another, signed in duplicate, the company having one copy and the lessee the other, it is not competent to prove the contents of said instrument upon the statement of the witness that had applied to the officers of the company in New York for their co- and had failed to obtain it, as it was mislaid, but had not applied the lessee for his copy, the proof being offered in a proceeding against said lessee. (R.)
2. The laborer or mechanic who does the work and furnishes the materials, is the person entitled to a lien upon the property of his employer under the provisions of the Act of 1869. (R.)
3. The laborer or mechanic is not entitled to a lien on any greater interest in the property than his employer had at the time the work was done or the materials furnished. (R.)
4. An immaterial error is no ground of new trial. (R.)

Mechanic's lien. Secondary evidence. New trial. Before
Judge PARROTT. Gordon county. At Chambers. November 18th, 1871.

Gustavus W. Nagle commenced the statutory proceedings as a mechanic, against Abel D. Breed, as the lessee of the Selma, Rome and Dalton Railroad, for the sum of \$7,453 for labor done and materials furnished in the construction of said railroad in the county of Gordon.

The execution based on the aforesaid proceedings was levied "on the track and roadbed of the Selma, Rome and Dalton Railroad, lying within said county of Gordon, and also upon the bridges, piers, abutments, etc., upon said railroad lying in Gordon county, in favor of Gustavus W. Nagle vs. A. D. Breed, lessee of Selma, Rome and Dalton Railroad, on November 2d, 1870.

The defendant filed an affidavit of illegality upon the following grounds, to-wit:

1st. Because no contract was ever made with defendant by plaintiff.

2d. Because plaintiff is a contractor and not a mechanic.

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3d. Because plaintiff's lien, if he has any, exists by virtue of the proper record of his lien in the Clerk's office of the Superior Court, and can only be enforced by ordinary suit at law.

Upon the trial Daniel S. Printup, Esq., a witness for the defendant, testified as follows, to-wit: There was a written contract between the Selma, Rome and Dalton Railroad Company and A. D. Breed, signed in duplicate, Breed taking one copy and the officers of the road the other. Witness had, at some time, but not with reference to this case, applied to the officers of the road in New York for their copy but it was mislaid and he had failed to get it. He had not applied to Breed, who resides in the State of Ohio, for his copy.

Plaintiff, at this point, objected to the witness' stating the contents of said contract. The objection was overruled, and plaintiff excepted.

The Court charged the jury as follows, to-wit: "If you are satisfied, from the evidence, that Nagle did the work as a mechanic for Breed, and that he was the lessee of the road, he would be entitled to a verdict. If you think, from the evidence, that plaintiff did not perform the work, and that Breed was not the lessee of the road at the time the work was done, you will find for the defendant. If the evidence shows that Nagle was the contractor merely, and not the mechanic, then, as a contractor, he would not have a right to enforce his claim in this way. A mechanic may be a contractor, and if he does work as a mechanic (for others and himself as contractors) for a railroad company, he would be entitled to enforce his lien as a mechanic. A mechanic's lien is recognized by the Constitution; such a lien attaches at the time the labor is performed and the material furnished. The affidavit, the order of the Judge, the execution, are the means simply by which the lien is enforced."

The jury returned a verdict for the defendant. The plaintiff moved for a new trial upon the following, among other grounds, to-wit:

1st. Because the Court erred in admitting the testimony

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of Daniel S. Printup, Esq., as to the contents of said written contract.

2d. Because the verdict was contrary to law and the evidence of the Court.

3d. Because the verdict was contrary to the evidence.

The Court sustained the motion and ordered a new trial. Defendant excepted and assigns said rulings as error.

PRINTUP & FOCHE, for plaintiff in error. A contractor has no lien: *Footman vs. Pussey, Jones & Co.*, decided January Term, 1872. Nagle's lien, if he has any, is upon the property of his employer, viz: Breed's leasehold interest. Ga. Cons., Art. I., sec. 30; Acts of 1869, 135; 11 Ga. R., 45; 19 Ga. R., 45; 1 Redf. on Rs., 443; 31 Vt. R., 21; Ind. R., 67; 37 Barb., 205. A railroad cannot be levied upon and sold in detached parcels: 9 Ga. R., 377; 2 Redf., 13 Sergt. and R., 210; 9 Watts and Serg. R., 27; 24 Ark. R., 257.

ALEXANDER & WRIGHT, represented by W. H. DAVIS, for defendant.

WARNER, Chief Justice.

The only error assigned to the judgment of the Court is the granting a new trial. Although the testimony of Printup, as to the contents of the written contract, was properly admitted, still, in our judgment, the verdict is right, under the evidence and the law applicable thereto independent of Printup's testimony. The laborer or mechanic who *does the work* for his employer, and *furnishes the materials*, is the person who is entitled to the lien upon the property of his employer, under the provisions of the Act of 1869, and then he is not entitled to a lien on any greater interest in that property than his employer had in it at the time the work was done thereon; his lien is upon *the property of his employer* for the labor done and materials furnished under the provisions of the Act. The property levied

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satisfy the plaintiff's lien by the sheriff does not appear, by the sheriff's entry on the *fi. fa.*, to have been levied upon as the property of the defendant therein, or that he had any interest in the property levied on. If the defendant was the lessee of the railroad, and not the owner of it, then his interest as such lessee of the road could only be levied on and sold for his debts and liabilities to the extent of such an interest as he had in it as such lessee. The verdict being right, under the law and facts of the case, it was error to grant the new trial.

Let the judgment of the Court below be reversed.

HAYDEN HUGHES, plaintiff in error, vs. JOHN B. COURSEY, defendant in error.

1. On a motion for a new trial, on the ground of newly discovered evidence, the evidence is not cumulative if it refers to a material issue not made at the trial, either by the pleadings or the evidence.
2. When a case was dismissed in this Court for want of prosecution, and it appeared in a bill, filed in the Court below for a new trial, that the plaintiff's counsel had been misled by a statement of the defendant's counsel, to the effect that, under the rules of this Court, the case would be put at the heel of the whole docket, on agreement of counsel, and at the request of said defendant's counsel, and solely for his convenience he had so agreed, and had, in consequence, not appeared at the calling of the case, all of which was admitted by said defendant's counsel, who assumed the whole blame of the non-appearance, and admitted that the plaintiff was in no *laches* :

Held, That, as the motion for a new trial was meritorious, and the fault of its miscarriage was with the defendant in error, by his own admission, the Court should have sanctioned the bill.

Equity. Cumulative evidence. Misrepresentations. Tried Before Judge ALEXANDER. Laurens Superior Court. October Term, 1871.

Hayden Hughes filed his bill against John B. Coursey, containing, substantially, the following allegations: That said Coursey brought an action for damages, from breach of

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contract against complainant, and at the April Term, 1869 of Laurens Superior Court, a judgment was rendered for the plaintiff for \$350, with interest and costs of suit; that complainant moved for a new trial, which motion was overruled at April Term, 1871; that a bill of exceptions to said decision was filed in accordance with the statute, and placed upon the docket of the Supreme Court for a hearing, at the June Term, 1870, of said Court; that counsel was prepared to represent complainant in the Supreme Court, but was prevented from so doing by representations of counsel for defendant; that Rivers, counsel for complainant, was approached by Stanley, counsel for defendant, and urged to consent that said case might be placed at the heel of the docket of the Supreme Court, for, on account of the health of his (Stanley's) wife, it would be very inconvenient for him to attend and argue said cause in its regular order; that he had recently had an interview with John Rutherford, Esq., an attorney of said Court, who stated that, under a rule of said Court, counsel could, by agreement transfer a case to the heel of the docket, and all that was necessary to accomplish this end was to write to the Clerk, inform him of the consent, and ask him to make the transfer. Complainant charges that his said counsel, acting under the aforesaid representations, and influenced wholly by a desire to accommodate his friend, Mr. Stanley, entered into the consent to postpone the case, believing, at the time, that such was the rule and practice of the Supreme Court in reference to the transfer of cases; that complainant's counsel, under these circumstances, failed to attend the Supreme Court on the day said cause was called, in its order, and there being no one representing the plaintiff in error, the writ of error was dismissed; prayer, that any further proceeding on the judgment or execution aforesaid be enjoined until the further order of the Court; that the verdict and judgment be set aside and a new trial awarded; that the writ of subpoena issue.

Exhibit "A" contained the record of the suit in favor of John B. Coursey *vs.* Hayden Hughes. The declaration con-

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tained, substantially, the following allegations: That on or about the second Monday in October, 1866, Hayden Hughes entered into a contract with petitioner for his services as overseer or agent on said Hughes' plantation for the year 1867, petitioner to be paid \$500, and to be furnished with supplies of all kinds sufficient to maintain petitioner and his family, consisting of a wife and five children, for the year 1867; that petitioner prepared to enter the service of said Hughes, at great expense; that, after petitioner had entered upon his duties as aforesaid, to-wit: on January 1st, 1867, said Hughes ejected petitioner and his family from said plantation, to his damage \$1,500.

Hayden Hughes pleaded the general issue; further, that he contracted with plaintiff, upon condition that defendant could employ labor; that, afterward, plaintiff and defendant had a full settlement, and plaintiff left his service voluntarily.

The jury found a verdict for the plaintiff for \$350 and cost.

Exhibit "B" contained the proceedings in said cause after verdict substantially as follows, to-wit:

Counsel for defendant moved for a new trial upon the following grounds, to-wit:

- 1st. Because the verdict is contrary to law.
- 2d. Because the verdict is contrary to evidence.
- 3d. Because the verdict is contrary to the evidence and the principles of justice and equity.
- 4th. Because the verdict is decidedly and strongly against the weight of evidence.
- 5th. Because of newly discovered evidence material to the case.

In support of the last ground the affidavits of Nathan Jones, Elmira Hughes and John Hughes, to the effect that plaintiff had attempted to employ for his own place, for the year 1867, hands in the service of defendant, were appended.

The Court overruled the motion for a new trial, and the defendant, Hayden Hughes, excepted.

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The Court refused the injunction, and plaintiff in error excepted and assigns said ruling as error.

LYON, DEGRAFFENREID & IRVIN; HANSELL & HANSELL, represented by B. H. HILL; JONATHAN RIVERS, plaintiff in error.

No appearance for defendant.

McCAY, Judge.

We are very reluctant to do anything looking toward relaxation of the effect of the judgments of this Court. If no judgment, obtained in any Court, in favor of one whose fault produced the judgment ought in justice to stand. If only the bill but the affidavit of the counsel of the defendant in error shows that the case was dismissed here in consequence of the fault of the defendant's counsel. Mr. Rivers was ready to come here and give the case his attention. It did not come in consequence of the statements of Mr. Staley, and solely to accommodate him. It seems outrageous that a judgment should go in favor of the defendant in error and to the profit and gain of such defendant when the whole fault was, as is admitted, in him. As this seems a meritorious case, and the motion for new trial failed by the fault of the defendant, we, with some reluctance, reverse the judgment.

If it be true, as the affidavits appended to the motion for a new trial show, that the plaintiff in the original suit had the cause, or a leading cause why Hughes was unable to put his hands for the new year, it would be a very strong reply to his claim against Hughes. Nothing of this appeared in the pleadings or in the evidence at the trial, and it would, as I think, be a misuse of the word to call this cumulative testimony. True, it adds to the defenses Hughes has, but it is not evidence on the same line of defense set up by the pleadings and evidence at the trial.

Judgment reversed.

Satterfield vs. Shwab and Company.

WILLIAM SATTERFIELD, plaintiff in error, *vs.* **A. SHWAB AND COMPANY**, defendants in error.

The statute of limitations was suspended from December, 1860, to the first of December, 1861, and again from November 8th, 1865, to July, 1868, and an account which became due in August, 1861, and was sued on July 13th, 1869, was not barred. (R.)

Statute of limitations. Before Judge **PARROTT**. Bartow Superior Court. March Term, 1872.

For the facts of this case see the decision.

JOHN W. WOFFORD, represented by **HENRY JACKSON & BROTHER**, for plaintiff in error.

WARREN AKIN, for defendants.

WARNER, Chief Justice.

The plaintiffs brought their action against the defendant on an open account for goods purchased in June, 1861, and which became due on the 21st of August, 1861. Suit was commenced on the 13th day of July, 1869. The defendant pleaded the statute of limitations in bar of the plaintiff's right to recover. The jury, under the charge of the Court, found a verdict for the plaintiffs. The Court charged the jury that the statute of limitations was suspended from the month of December, 1860, to the 1st of December, 1861, and was again legally suspended on the 8th of November, 1865, and did not commence to run again until the month of July, 1868, and that an account made in the year 1861, which became due in August of that year, and sued on the 13th of July, 1869, was not barred by the statute of limitations unless four years had elapsed from the 1st of December, 1861, to the 8th of November, 1865, to which charge the defendant excepted. In our judgment, there was no error in the charge of the Court to the jury, and that the plain-

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tiffs' right of action was not barred by the statute of limitations, under the laws of this State.

Let the judgment of the Court below be affirmed.

RICHARD ROE, casual ejector, and C. LOPEZ, tenant in possession, plaintiffs in error, *vs.* JOHN DOE, *ex demise*, LEMUEL T. DOWNING, administrator, *et al.*, defendants in error.

1. An action of ejectment is not strictly an action for a *tort*, but is a mixed action, partly and nominally for a *tort*, but mainly to try title to land.
2. Where, in a declaration in ejectment, the ouster is alleged as occurring since the 1st of June, 1865, but the proof shows the defendant to have been in possession before the 1st of June, 1865, the action is not barred by the Act of March 16th, 1869, because not brought within three months after the 16th March, 1869.
3. No damages or *mesne* profits can be recovered behind the 1st of June, 1865, but the defendant, if he defends by his possession under color alone, must show *that* possession to have been continued seven years before bringing the suit.

Ejectment. Statute of Limitations. *Mesne* profits. Prescription. Tried before Judge HARRELL. Muscogee Superior Court. May Term, 1871.

John Doe, on the several demises of Lemuel T. Downing, as administrator of Sebastian Hoffman, deceased, of Felix McArdle, as administrator of Thomas Brassill, deceased, and of Catherine McArdle, brought ejectment for a lot of land in the city of Columbus, in the county of Muscogee, known as number seventy-seven, lying on the west side of Broad street, fronting easterly on said street, forty-five feet north and south, and extending back, westerly of the same width, one hundred and forty-seven feet ten inches, containing three-sixteenths of an acre, more or less, against Richard Roe, casual ejector, and C. Lopez, tenant in possession. The ouster is laid in the counts, under the first two demises, on January 11th, 1864, and in the count, under the last, on October 11th,

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1868. The declaration was filed in office on November 8th, 1870.

The defendants pleaded the general issue, and the statute of limitations.

Upon the trial, the following evidence was introduced for the plaintiffs:

Henry McCauley, sworn: Knew Thomas Brassill from 1855 until his death, in 1868; Catherine McArdle is his only surviving sister; he had no brothers, wife or children. Am acquainted with the lot sued for; Sebastian Hoffman was in possession in 1855, and remained in possession until his death, which occurred about the beginning of the war; the rent since January 1st, 1867, was worth \$200 per annum. Lopez was put in possession by Brassill about October 1st, 1863, and remained in possession until his death, in 1868. Witness was present, in the spring or summer of 1866, when Brassill, in the presence of James O'Connor and witness, demanded possession of the lot of Lopez; Lopez refused to deliver possession; witness was in possession of a part of the lot; did not deliver it up to Lopez; he gave it to witness, and afterwards took some proceedings to eject him; witness gave some kind of a bond, by which he held the land; the attorney for Lopez dismissed the case during a recess of Court.

Plaintiff introduced a deed to the lot from William H. Harrell to Sebastian Hoffman, dated January 22d, 1840, recorded January 24th, 1840.

Also, letters of administration upon the estate of Sebastian Hoffman, issued to Lemuel T. Downing on January 14th, 1862.

Also, deed from Lemuel T. Downing, administrator, to Thomas Brassill, to said property, dated May 4th, 1863, recorded September 14th, 1863.

Also, letters of administration on the estate of Thomas Brassill, deceased, issued to Felix McArdle on December 7th, 1868.

Also, the execution docket, showing two executions against said Felix McArdle, administrator, dated January 30th, 1871,

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based upon judgments rendered at the December Term, 1866 of Muscogee Superior Court, one for \$54 35, principal, besides interest and costs, the other for \$208 70, principal besides interest and costs.

Felix McArdle, sworn: Brassill put Lopez in possession of the premises in dispute about October 1st, 1863. Catharine was always recognized as the sister of Thomas Brassill; never heard him speak of half brothers and sisters; witness had seen a man in the city of Columbus who passed for his father; Hoffman died before the war; thinks he lived on the lot in dispute when he died; has known Brassill since 1855.

Plaintiff closed his case, and defendants introduced the following testimony:

..... Gettinger, sworn: Lopez went in possession in 1863; does not know that he claimed the property as his own; he lived on the place; knew Brassill in his life; never heard him say anything about buying the property.

..... Sharp, sworn: Lopez went into possession in the fall of 1863 or first of 1864; he always claimed the lot as his own; witness went to Brassill to rent said property; Brassill said he had nothing to do with it, as the lot belonged to Lopez. Lopez was present at the time, but was not in possession. Brassill said he bought the property for Lopez.

S. H. Hill, sworn: Lopez was in possession in 1864, during Brassill's life; witness inquired of Brassill, once in the presence of Lopez, what he asked for the place; Brassill responded that he had nothing to do with it, and that witness must see the old man, pointing to Lopez, as the place belonged to him.

..... Booher, sworn: Lopez went into possession in 1864 during the life of Brassill; witness asked Brassill if he would sell the place; he responded that he could not sell it, as the place belonged to Lopez; witness asked him to see Lopez for witness, which he promised him to do.

Plaintiff, in rebuttal, read in evidence a bill in equity filed in office on April 14th, 1866, returnable to the Master.

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Term, 1866, of Muscogee Superior Court, in which said C. Lopez was complainant, and Thomas Brassill defendant, containing substantially the following allegations :

That in 1861 complainant formed a partnership with defendant for the purpose of manufacturing cigars and the purchase and sale of tobacco ; that defendant received all the proceeds of said business, and in 1863 informed complainant that he, defendant, then had in his hands over \$20,000 in Confederate money, the property of complainant ; that under instructions from complainant defendant purchased a house and lot with complainant's said money, paying \$5,800 for the same, from Lemuel T. Downing, administrator upon the estate of Sebastian Hoffman ; that defendant informed complainant that he had purchased said property for him, and that complainant could take possession of the same ; that soon after the purchase of said property, which occurred early in the year 1863, complainant asked defendant, who was then sick in bed, as to the title to said lot, and was answered that there was no trouble about it, and that as soon as he, defendant, could attend to business, (being then confined to his bed,) he would turn over to complainant the title papers to said property ; that complainant went into possession of said lot in the year 1863, and has remained in possession until the present time ; that soon after the partnership between complainant and defendant was dissolved, which occurred in the month of April, 1865, complainant called upon defendant for a settlement of their partnership business, and for the title papers to said lot ; that under one pretense or another said defendant has postponed the matter, and complainant has discovered, by a reference to the records of Muscogee county, that said defendant took the title to said lot in his own name. Prayer : that defendant may be decreed to be a trustee, holding the title to said property for the benefit of complainant ; that he may further be decreed to execute a deed to said property conveying the same to complainant ; that the writ of subpoena may issue.

Plaintiff then introduced the verdict of the jury, which

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was in favor of the defendant, and the judgment of the Court based thereon. Verdict and judgment rendered at November Term, 1869, of Muscogee Superior Court.

Also, the judgment of the Superior Court rendered at November Term, 1870, making the judgment of affirmance of the Supreme Court in said case the judgment of that Court.

Plaintiff reintroduced Felix McArdle, who testified as follows: The estate of Brassill is in debt about \$6,000, and has no personalty with which to pay the debts; the land sued for is now all the property left belonging to the estate.

Defendants then introduced receipts in full of the executions against Felix McArdle, administrator, placed in evidence by plaintiff.

The jury returned a verdict for the defendants. Plaintiff moved for a new trial upon the following grounds, to-wit:

1st. Because the said verdict is strongly and decidedly against the evidence, and absolutely without any evidence to support it.

2d. Because said verdict is against law.

The Court granted a new trial, and defendants excepted and now assign said ruling as error.

W. DOUGHERTY; BLANDFORD & CRAWFORD; W. F. WILLIAMS; B. A. THORNTON, for plaintiffs in error.

L. T. DOWNING, for defendant.

McCAY, Judge.

Mr. Chitty says that the action of ejectment is neither a personal nor a real action, but a mixed one—partly to try titles, and partly for damages, though, for many years, the damages were only nominal, say a shilling, the real recovery being the land: 1 Chitty's Plead., 188. And, until our Act of 1834, this was the law of Georgia. Since then, the recovery is also for the *mesne* profits, though it has always been the practice to introduce a special count for this purpose, aban-

doing the fiction. The real object of the action is to recover the land, and it is only as a fiction that it is for trespass.

We have, in Georgia, no statute of limitations for such an action. We attain the same end by our law of prescription, which gives the person in possession for seven years a title. And yet the Code, which has no period of limitations for ejectment, has a provision that all actions for trespass upon, or damages to realty shall be brought within four years after the right of action accrues. According to the argument of the plaintiff in error, an action of ejectment is barred, under the Code, in four years. We do not think it was the intention of the codifiers to include the action of ejectment under the head of actions of trespass. Nor was it the intent of the Act of 1869 to include it within the term *torts*. It is not the natural proper meaning of the word. No lawyer, in the ordinary use of the word *tort*, intends to include actions of ejectment, however well he may know that it has that form.

It is an action to try titles to land—a fictitious proceeding, in which John Doe alleges that, having leased from A B certain land, Richard Roe, with sticks and stones, drove him out, and did him great damage. This looks very tortious; but the writ is to be served on the tenant in possession, and he is required by law (new rules of Court, section 25,) to admit, in effect, everything charged against him, to-wit: lease, entry and ouster. Having done this, admitted the trespass, he may defend—that is, the *real action* goes on.

The count for *mesne profits* is, no doubt, within the Act of 1869. It has always been held in this State not to have the same statutory period of limitations as the action to try titles. We cannot but think that if it had been intended to include the action of ejectment within this Act of 1869, considering the great detail, which is a marked feature of the Act, some other and more definite language would have been used than the words, "all actions for *torts*," and so thinking, we affirm the judgment.

Judgment affirmed.

Williamson vs. Wardlaw.

ALLEN WILLIAMSON, plaintiff in error, vs. JOHN R. WARDLAW, defendant in error.

Where suits were commenced on promissory notes and judgments rendered in favor of the plaintiff, which were set aside by the Supreme Court, upon the ground that said suits were void, and within six months from this judgment said notes were again sued, these facts will not prevent the statutory bar from attaching. (R.)

Statute of Limitations. Dismissal and renewal. Before Judge HARVEY. Walker Superior Court. February Term, 1872.

John R. Wardlaw brought complaint against Allen Williamson on thirteen promissory notes, each dated February 14th, 1860, due January 1st next thereafter, each for the sum of \$50, except one for the sum of \$15 62, signed by John Hatfield and Allen Williamson, payable to John R. Wardlaw or bearer, except one of the \$50 notes, which was payable to said Wardlaw, as administrator of McConnell. The declaration was filed in office on September 26th, 1870. The defendant pleaded the statute of limitations.

It appeared from the evidence that one summons issued, embracing all of the aforesaid notes, from the County Court on October 19th, 1866, and that judgments were rendered on the same on December 10th, 1866; that the business of the County Court was transferred to the Superior Court, and that in this last tribunal, in March, 1870, a motion was made to set said judgments aside, which was overruled; that said cause was carried to the Supreme Court and the decision reversed at June Term, 1870.

The Court charged the jury as follows, to-wit: "In this case the defendant pleads the statute requiring such claims as those sued on to be sued by January 1st, 1870, in bar of the plaintiff's right of action. The plaintiff alleges that the notes in controversy were sued on in the year 1866, in the monthly County Court, and judgments obtained on the same; that since January 1st, 1870, the said judgments have been set aside and that he has commenced this action on said

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notes within six months after the said judgments were set aside. I charge you that if the plaintiff, in the year 1866, carried these notes to the County Judge to sue, and the County Judge sued them in the manner shown by the summons and docket of his Court, and the plaintiff supposed such suits to be valid, and the defendant treated them as such until the motion was made to set the judgments aside, and after said judgments were set aside the plaintiff recommenced suit within six months, he would have the right to maintain his suit and the notes are not barred. Such I consider the spirit of the law, which allows a party to recommence suit within six months, though it is stretching the letter of it a great way."

The jury returned a verdict for the defendant, and the plaintiff moved for a new trial because the verdict was contrary to the charge of the Court, the law and the evidence.

The motion for a new trial was sustained by the Court, and defendant excepted and assigns error upon the following grounds, to-wit :

1st. Because the Court erred in his said charge.

2d. Because the verdict was right even if against the said charge.

3d. Because the verdict was consistent with said charge.

WRIGHT & FEATHERSTON; D. C. SUTTON, for plaintiff in error. 1st. Limitation laws are laws of repose: Ang. on Lim., secs. 23, 29, 485, 488; 2d Par. on Co., 342; 5th Ga. R., 486; 15th *Id.*, 11; 12th *Id.*, 61; 16th Wend. R., 572; Angell on Lim., 329; 2d Munf. R., 181; 1st Cheves R., 203; 1st Atk. R., 1; *Id.*, 232; 2d Ga. Dec., 201; 1st Ga. R., 32. 2d. Act of 1870 is a bar: 1st Ga. R., 32. 3d. The former judgments were mere nullities: 40th Ga. R., 702.

McCutchen & Shumate, represented by R. J. McCamy, or defendant.

WARNER, Chief Justice.

The plaintiff brought his action against the defendants on several promissory notes, as set forth in his declaration. The defendants pleaded the statute of limitations. The notes were dated 14th February, 1860, and due the 1st of January next thereafter. On the trial of the case the jury found verdict for the defendants. A motion was made for a new trial, which was granted by the Court, and the defendant excepted. The fourth section of the Act of 1869 declares that all actions on promissory notes made prior to the 1st of June, 1865, not then barred, should be brought by the 1st of January next thereafter, or the right of the plaintiff, and all right of action for its enforcement should be forever barred. It was contended by the plaintiff that suit was commenced on these notes within time, but, under the decision of this Court, in *Williamson vs. Wardlaw*, 40 *Georgia Reports*, 702, there never was a suit upon them, that the former attempt to sue them and the proceedings had for that purpose was void, and the action on them must be considered as having been commenced for the first time on the 26th of September, 1870, the date of the commencement of the present action, and was, therefore, barred under the provision of the Act of 1869. It was error in the Court to grant new trial on the statement of facts contained in the record.

Let the judgment of the Court below be reversed.

OWEN SMITH, administrator, plaintiff in error, vs. WILLIAM D. HOWELL *et al.*, defendants in error.

Where, in a suit pending on a promissory note dated before the 1st of June, 1865, it appeared that the suit was in the name of an administrator, that a widow and minor children were the sole distributees of the estate, and that the note had been taken by the administrator as part of the consideration of a tract of land sold by him belonging to the estate :

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Held, That, *prima facie*, the note was due to the widow and minors, and within the exceptions to the Act of October 13, 1870, so that the tax affidavit was unnecessary.

Relief Act of 1870. Tax affidavit. Exceptions. Before Judge SESSIONS. Lowndes Superior Court. December Adjourned Term, 1871.

Owen Smith, as administrator upon the estate of Aaron Giddens, deceased, brought complaint against William R. Manning, as administrator upon the estate of William Ashley and William D. Howell as makers, and Leroy F. Dasher and Edwin S. Dasher as indorsers, on a note dated December 27th, 1856, due one day after date, for the sum of \$1,200, with a credit thereon of \$70, dated April 23d, 1857. When said cause was called for trial, defendants moved to dismiss the same because no affidavit as to payment of taxes had been filed as required by the Relief Act of 1870.

The plaintiff, Owen Smith, was sworn, who testified substantially as follows: That he, as administrator, sold certain real estate as the property of his intestate to Leroy F. Dasher and Edwin S. Dasher, who transferred the note sued on in payment therefor; that said sale occurred since June 1st, 1865; that said note is the property of the estate of Aaron Giddens, deceased; that the widow and minors are the only heirs to said estate; that the indorsements were made since June 1st, 1865.

The Court dismissed the suit as to the makers, and ordered judgment against Edwin S. Dasher, one of the indorsers, there being no service as to the other; whereupon plaintiff in error excepted and assigns said ruling as error.

PEEPLES & LYLES, represented by C. PEEPLES; A. H. HANEELL, for plaintiff in error.

No appearance for defendants.

 Kimbro & Company vs. Edmondson.

McCAY, Judge.

We have, in several cases since the passage of the Act of 13th October, 1870, ruled that if a widow and minor children were the equitable owners of a debt, the case was within the exceptions to that Act, even though the legal title was in a guardian, executor, administrator or trustee. This is clearly such a case. At the date of the Act this note was the property equitably of these minors and the widow, in good faith, and according to the rulings we have alluded to, the case is within the exceptions to the Act.

Judgment reversed.

R. P. S. KIMBRO & COMPANY, plaintiffs in error, vs. GEORGE W. EDMONDSON, sheriff, defendant in error.

Where a sheriff fails to advertise and sell goods levied on under a mortgage *fi. fa.* on the 10th of April, 1871, until the first Tuesday in October, upon the ground that the defendant notified him that he would apply for a homestead exemption in said property, which exemption was not set apart until September 19th, 1871, upon application in behalf of plaintiffs in *fi. fa.*, a rule absolute should be issued against him. (R.)

Rule against sheriff. Execution. Diligence. Tried before Judge WRIGHT. Fayette Superior Court. October Term 1871.

On March 28th, 1871, an execution based upon a mortgage on personalty, issued in favor of R. P. S. Kimbro and Company against L. E. Tidwell, for the sum of \$388 07, principal debt, besides interest and costs, to be levied "of a two-thirds of a stock of goods, now in the hands of L. E. Tidwell, in the town of Fayetteville." The execution was levied upon the property therein described on April 10th, 1871. At the October Term, 1871, a rule was served on George W. Edmondson, sheriff of Fayette county, requiring

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him to show cause why he should not pay over the principal, interest and costs due on the above stated execution. In response to the rule the sheriff answered substantially as follows: That the defendant, L. E. Tidwell, notified respondent of his application for a homestead, which was duly set apart on September 19th, 1871, in the property embraced in said *f. fa.*; that this fact, together with others hereinafter mentioned, prevented the sale of said property on the first Tuesday in October, 1871; that had said property been sold at an earlier date the defendant, L. E. Tidwell, would have claimed a homestead in the proceeds of said sale; that if the property had been sold on the first Tuesday in July, 1871, as first advertised, the same would not have brought more than one hundred dollars; that after the levy and before said property could have been brought to sale, said L. E. Tidwell notified respondent that the property should not be brought to sale, from which he understood that said Tidwell would take his homestead or exemption before the same could be sold; that said mortgage is illegal and unauthorized, in this that there is no law authorizing a mortgage to be made on part of a stock of goods; that the mortgage *f. fa.* does not specify the property mortgaged and to be sold; that respondent was notified by counsel for defendant not to sell all of said stock, provided he sold at all; that on the first Tuesday in July there was another stock of goods in the house and the owner controlled the key; that respondent, therefore, could not have sold the goods embraced in the mortgage *f. fa.* at that time except by breaking open said storehouse, which he did not feel authorized to do; that the said L. E. Tidwell notified respondent verbally that if he attempted to sell he would apply for a homestead in said goods.

Counsel for Kimbro and Company demurred to said answer. The demurrer was sustained by the Court as to all of said answer, except as to such part as set up the homestead set apart to L. E. Tidwell. To which ruling plaintiffs in error excepted and now assigns the same as error.

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HENRY JACKSON & BROTHER, for plaintiffs in error.

HUGH BUCHANAN; TIDWELL & FEARS; R. S. DORSEY
for defendant.

WARNER, Chief Justice.

This was a rule against the sheriff calling upon him to show cause why he had not made the money on a *fi. fa.* placed in his hands, which issued on the foreclosure of a mortgage of two-thirds of a stock of goods, against the defendant, in favor of the mortgagees and plaintiffs in the *fi. fa.* It appears, from the record, that the sheriff had levied the *fi. fa.* on the two-thirds interest of the stock of goods in the possession of the defendant on the 10th day of April, 1871, and left the same in the possession of the defendant; that he did not advertise the goods for sale until the first Tuesday in October, 1871; that the defendant notified the sheriff, after the levy on the goods, that he could and would apply for a homestead exemption of the goods, and that he had done so; that on the 19th day of September, 1871, the goods were set apart to the defendant by the Ordinary as a homestead exemption. The sheriff, in his answer, also stated other reasons why he should not be held liable, and especially that there was another stock of goods in the house in which he had left the goods levied on, and that the owner controlled the key, (without stating who was the owner of the house;) that he could not have sold and delivered the stock of goods at the time the same were advertised for sale unless by breaking open the storehouse, which he did not feel authorized to do. The plaintiff demurred to the sheriff's answer as being insufficient in law to excuse him from liability. The Court sustained the demurrer to all of the answer of the sheriff except that part of it which related to the defendant's homestead exemption, but overruled the demurrer as to that, and dismissed the rule; whereupon the plaintiff excepted. When the mortgage *fi. fa.* was delivered to the sheriff, the law made it his duty to levy on the mortgaged property, to advertise

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and sell the same in the manner prescribed thereby: Code, 3896. This he did not do, but because the defendant notified him that he could, would, and had applied for a homestead exemption of the goods levied on, he postponed advertising the goods for sale under his levy made thereon on the 10th of April, 1871, until the first Tuesday in October, 1871, and in the meantime the defendant obtained his homestead exemption of the goods on the 19th of September prior to the first Tuesday in October, when the sheriff had advertised the goods for sale. This neglect of duty on the part of the sheriff, in not advertising the sale of the goods levied on by him until after the defendant had obtained his homestead exemption thereon, looks very much like there was an understanding and *collusion* between the sheriff and the defendant, that the goods should not be sold under the mortgage *fa. fa.* until after the defendant had obtained his homestead exemption, so as to prevent them from being sold under it. In view of the facts of this case, as disclosed in the record, the Court below erred in not sustaining the demurrer to that part of the sheriff's answer relating to the defendant's homestead exemption, and in not making the rule absolute against the sheriff for the value of the goods levied on.

Let the judgment of the Court below be reversed.

GEORGE W. ALLEN *et al.*, plaintiffs in error, vs. J. W. LATHROP & COMPANY, defendants in error.

1. A mortgage upon real estate given to secure "advances" to be made by the mortgagee to the mortgagor, for the purpose of carrying on the farm of the mortgagor for 1870, is not invalid for want of a sufficient description of the debt intended to be secured.
 2. A mortgagor is estopped from denying his own title to the property mortgaged, and third parties claiming title to the land cannot at law make themselves parties to the proceedings to foreclose for the purpose of asserting their rights. The judgment is between the parties to the mortgage, and binds them, and them only.
- The absence of a party not legally interested in the result of a case, is no ground of continuance. (R.)

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Foreclosure of mortgage. Description. Advances. Toppel. Title. Tried before Judge COLE. Houston Superior Court. December Term, 1871.

J. W. Lathrop and Company commenced proceeding foreclose a mortgage on real estate executed by "James Allen, George W. Allen, Eugenia C. Dunlap, and James Ward, in right of his wife Cornelia Ward, legatees under the last will and testament of Hugh Allen, deceased," in consideration of advances in money and plantation supplies to be advanced to said James M. Allen by said James Lathrop and Company aforesaid, said supplies and money being advanced by said J. W. Lathrop and Company for the mutual benefit of said James H. Allen, George W. Allen, Eugenia C. Dunlap, and James M. Ward, in right of his wife Cornelia Ward, said supplies and money being advanced for the purpose of carrying on the farm for the year 1870 in the county of Houston, in said State," "to secure said James W. Lathrop and Company for the same." The mortgage was dated January 12th, 1870. The rule *nisi* recited that there was due to plaintiffs on January 10th, 1871, \$4,850.

James H. Allen objected to the foreclosure of said mortgage upon the following grounds, to-wit:

1st. Because he holds said realty as executor of James Allen, deceased; said estate has never been settled, and said land has not been turned over to the legatees of Hugh Allen; that there are now outstanding debts against the estate of said Hugh Allen, and it will be necessary for defendant, as executor as aforesaid, to administer upon said land for the payment of said debts, and that said land is under the will of Hugh Allen, deceased, charged with the payment of certain legacies in said will set forth, which will be sufficient to exhaust the whole of said land.

2d. That as guardian for S. W. Allen, G. E. Allen, N. L. Allen, minors of Newton Allen, deceased, he is entitled to a distributive share of said land, and that by the conditions of the last will and testament of said Hugh A

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said land so mortgaged, as aforesaid, is given for the sole and separate use of the several legatees in said will mentioned, and that none of the defendants to the above rule had any legal right to sell said land or create any incumbrance thereon, the same being trust property.

The remaining mortgagors also filed objections to the foreclosure unnecessary here to be set forth.

The jury returned a verdict for the plaintiffs for the sum of \$4,858 21, with interest from January 10th, 1871.

The defendants assign the following errors upon the trial, to-wit :

1st. The Court erred in not granting a continuance upon the ground that James H. Allen, as guardian for the minors of Newton Allen had, after filing objections to said foreclosure and before the trial, been removed from his guardianship and no other guardian had been appointed.

2d. The Court erred in allowing said mortgage to be introduced in evidence, said mortgage describing no debt with sufficient accuracy and being given to secure the payment of debts not in existence at the time of the execution of the mortgage, and for debts of an indefinite amount.

3d. The Court erred in rejecting as evidence the last will and testament of Hugh Allen, deceased, sought to be introduced for the purpose of showing that the lands included in the mortgage comprised all of the lands mentioned in the will, and that the minors of Newton Allen were legatees under said will and interested in said realty ; that there had been no settlement of the estate, and the lands were incumbered with the payment of debts and legacies which were still unsettled ; that there had not been any assent of the executor to the execution of the mortgage ; that by the terms of the will the mortgagors were prevented from selling or incumbering said realty, and that they had no interest in the land to mortgage.

DUNCAN & MILLER; POE, HALL & POE, for plaintiffs in error. 1st. Defenses to foreclosure of mortgage : Code, secs.

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3892, 3903. 2d. A mortgage cannot be created to secure a debt not in existence: Code, sec. 1945; 25th Ga. R., 176. 3d. There had been no assent of the executor: Code, sec. 2416; 42d Ga. R., 123. 4th. The will was admissible in evidence: 30th Ga. R., 671.

WARREN & GRICE, for defendants. 1st. Defenses to foreclosure of mortgage: 36th Ga. R., 499; Code, sec. 3889; 19th Ga. R., 14; 25th *Ib.*, 383. 2d. Mortgage valid to secure future advances: 4th Kent's Coms., 175; 2d Powell on Mort., 533; 1st Hilliard on Mort., 286; 17th Pick. R., 414; 2d T. R., 462; 1 McC. Ch. R., 265; 2d Johns. Ch. R., 283; 25th Ga. R., 167; Stokes *vs.* Hollis, 42d Ga. R., 262; Hinton *vs.* F. W. Sims & Co., decided April 30th, 1872. 3d. Assent of executor: Code, sec. 2416.

McCAY, Judge.

Without question the common law rules make a mortgage which, on its face was to secure future advances, sufficiently certain: 4 Kent, 175; 1st Hilliard on Mortgages, 210-215, where the subject is fully treated and numerous authorities cited. But it is said that our Code changes this rule. Its language is, section 1945: "No particular form is necessary to constitute a mortgage. It must clearly indicate the creation of a lien, specify the debt to secure which it is given and the property on which it is to take effect." But this is, in truth, nothing more than the common law required, and amounts only to saying that the form of the undertaking is immaterial. If the material elements of a mortgage are there—sufficient certainty as to what the parties intend—the paper is good as a mortgage, though there be no words of conveyance or any other of the usual forms of a mortgage. In Leeds *vs.* Cameron, 3 Sumner's Reports, 492, Judge Story, in commenting upon very similar language in a statute of New Hampshire, the words were: "stating the sum of money to be secured," says it can hardly be supposed that it was the intent of the Legislature to make void all mortgages for in-

demnity, and yet this would be true if we are to give this language the restrictive meaning contended for, since it can never be known precisely what is the debt to be secured in such cases, it depending altogether on future events. And so we say as to this section of the Code. It is to have a reasonable construction, and is to be construed in reference to its intent, to-wit: to facilitate and not to hamper and restrict mortgage liens. It requires that the debt or duty of the mortgagor shall be specified; it does not say that such *duty shall be* specific and precise. It may be indefinite, as to indemnify a surety for whatever he may pay in a certain event, or to hold one harmless for whatever may happen under certain circumstances. The paper must point out what the parties intend. Here the intent expressed is that the *mortgagor shall pay to the mortgagee* any moneys he may advance to him for the purpose of carrying on his farm for 1870. *This debt or duty* is plainly pointed out and specified. And, though the precise amount of the debt does not appear, since it was and, from its nature, must have been indefinite, yet the means of finding what it was when due are plain. If this is not a good mortgage under the Code, then all mortgages for indemnity are bad. And we cannot think it was the intent to destroy the right of mortgage in the very class of cases in which they are most useful and proper.

If there be anything in law called an estoppel, it would seem that one who makes a mortgage upon land is estopped from denying he had title to the land, or at least such a right to it as authorized him to make the mortgage. It is, in the first place, a deed, and it is a settled rule that one is estopped by his deed even if the donee have not acted on it.

Again, in this case it is clear that the mortgagee advanced his money on the faith of this deed, and this would make it a good estoppel *in pais*. So far, therefore, as the mortgagees are concerned, they are estopped from denying their right to make this mortgage according to its terms, unless, indeed, they set up fraud in the mortgagor, which they do not do. As to the other parties they have no business here. They

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are not creditors of the mortgagors and do not, therefore, come in under section 3903 of the Code, or the amendment of 1866, section 3892. And even were they creditors I, for myself, doubt if they would not have to show fraud or intent to defraud them. But these parties come in as claimants to the land. They cannot be heard in this contest. This is a proceeding to make effective upon the rights of the mortgagors in this land a lien they have put upon it. The judgment binds them and those claiming under them, them and their privies, and nobody else. If they have no title, the mortgagee has nothing; if they have title, he gets in this proceeding a judgment authorizing that title and nothing else to be sold. The issue is between the mortgagors and mortgagee, and other claimants to the land have nothing to do with it. The mortgagees have a right to go on, get their judgment, levy on the land and sell it. After the judgment the other parties may, under our claim laws, claim it, or they may stand by their rights as owners in an action of ejectment. None of these parties except the mortgagors have any rights in this proceeding, nor are any of their rights or interests affected by it. Judge COLE was right, therefore in refusing the continuance, and the judgment is right.

Judgment affirmed.

HOPE H. CHRISTIAN, plaintiff in error, vs. JAMES B. RANSOME, defendant in error.

1. Where interrogatories were returned to a former Clerk in vacation and had the following entry on them:

"Received of M. W. Stamper the within package, who says that he received them from one of the commissioners, and that they have been unopened and unaltered.

"Sworn to and subscribed before me this 18th, March, 1871.

"W. H. DuBose, Clerk."

Which affidavit was not signed, and it was shown that the present former Clerks, some time after the last term of the Court, found the package in an iron till, on the floor, in the corner of the Clerk's office.

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and that it had remained in the possession of the present Clerk, unopened and unaltered, ever since, the depositions were inadmissible. (R.)

2 Mere inadequacy of price, or any other fact tending to show that the contract was unfair, unjust or against good conscience, will justify a Court of equity in refusing to decree a specific performance. (R.)

Exception to interrogatories. Specific performance. Before Judge HARRELL. Early Superior Court. April Term, 1872.

Hope H. Christian filed his bill against James B. Ransome, containing the following material allegations: That complainant, on May 11th, 1863, purchased from defendant lot number seventy-four, in the sixth district of Early county, for the sum of \$1,000, which was then and there paid; that complainant took defendant's bond to make title to said land by January 1st, 1864; that said land is of the value of \$2,000; that said defendant has failed and refused to comply with the condition of his said bond: Prayer, for specific performance.

The defendant answered the bill, substantially, as follows: Defendant denies that complainant purchased any lot of land from him for \$1,000; defendant admits that he executed the bond set forth in the bill; that the circumstances under which said bond was executed, were as follows: that, defendant having a valid title to lot number seventy-four, and Martin W. Stamper having William L. Mitchell's bond to lot number eighty-five, in the same district, defendant and Stamper agreed to exchange lots; Stamper was to execute to defendant his bond to make titles to lot number eighty-five by the 1st day of January next following; defendant was to execute a bond for titles to Stamper, conditioned to make him a title to lot number seventy-four on said January 1st next, and to give his note for \$1,000, payable on the same day, as the difference in value between the lots; that the terms were not reduced to writing immediately, but shortly thereafter; complainant came to defendant's house, bringing a written communication from Stamper, requesting defendant to make the

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bond for titles to complainant; that complainant, at the same time, delivered to defendant Stamper's bond to lot number eighty-five; that defendant delivered to complainant his note payable to Stamper for \$1,000 on said January 1st; that, there being no one present to attest the same, the execution of said bond was deferred; that shortly thereafter, complainant again came to defendant when he was sick in bed, and unable to attend to business, and presented a bond purporting to be drawn in accordance with the aforesaid agreement, and requested defendant to sign the same; that defendant, believing said bond to be as represented, signed the same without an examination; that before the said January 1st, complainant again came to respondent and stated that Stamper would be sure to comply with his bond to defendant and requested defendant to pay the amount of said note to him, although not yet due; that defendant paid said note; that defendant never received one dollar from anybody for lot number seventy-four; that Stamper has never complied with his bond, and, as defendant is advised and believed, has never paid Mitchell for said lot number eighty-five, nor obtained a title thereto; that defendant is now, and has always been, ready to carry out the contract as made; that complainant was fully acquainted with all of the aforesaid facts, and received defendant's \$1,000 for no consideration whatever. Prayer, that complainant may be decreed to deliver up defendant's bond, and to refund the \$1,000.

Defendant afterwards amended his answer, substantially, as follows: That defendant, at the time of the execution of said bond to complainant, did not intend said bond to be unconditional, but, on the contrary, did intend it to be conditional, on the execution of a title by Stamper to defendant to lot number eighty-five; that said absolute bond was obtained by fraud, complainant pretending that said bond was drawn in accordance with the previous agreement between Stamper and defendant; that said Stamper has since died insolvent and was insolvent at the time of the filing of said bill; that defendant has never had possession of lot number eighty-five

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nor delivered possession of lot number seventy-four; that defendant tenders the bond which Stamper executed, if complainant will deliver up defendant's bond.

The jury found for the defendant, and directed that the bond from defendant to complainant be delivered up to defendant, and the bond from Stamper to defendant be delivered up to complainant.

Complainant moved for a new trial upon the following grounds, to-wit:

1st. Because the Court erred in the following ruling: A set of interrogatories was on file in the Clerk's office containing the testimony of M. W. Stamper, which was delivered by him to the former Clerk in vacation and had not been opened. The interrogatories were sealed up, backed, directed and closed according to the rule of Court, with the following entry thereon, to-wit:

"Received of M. W. Stamper the within package, who says that he received them from one of the commissioners, and that they have been unopened and unaltered.

"Sworn to and subscribed before me this March 18th, 1871.

[Signed] "W. H. DuBose, Clerk."

Complainant proved, by the present Clerk, that he, some time after the last term of the Court, and DuBose, the former Clerk, went into the Clerk's office, and, in looking for papers, they found the package in an iron till on the floor in the corner of the room, and that DuBose then delivered it to him, and it had remained in his possession ever since, unopened and unaltered. The Court ruled the deposition inadmissible.

2d. Because the jury found contrary to the following charge of the Court: "If the defendant sets up that the contract was procured by fraud, he must allege and prove such acts or representations on the part of complainant as amounts to fraud. Fraud, when set up as a defense to a written contract sued on, cannot be inferred or presumed. The acts or

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declarations which constitute the fraud must be proven. Unless the defendant has proven that Dr. Christian procured the bond for title as it was written, by declarations that were false, or by acts that were deceitful, and by which Ransome was actually misled and deceived, then the proof of fraud fails, and the jury cannot set aside the contract on the ground of fraud. If the jury believe, from the evidence, that Stamper made his bond for title to Ransome for lot number eighty-five, and that Ransome accepted this bond without being induced to do so by fraud, as alleged, and that he gave to Christian his bond for title without conditions, and that he was not induced to do so by fraud, then he is bound by the contract to Christian, and the fact that Stamper afterward failed or refused to comply with his bond to Ransome, does not excuse Ransome from complying with his bond to complainant. If he accepted Stamper's bond without fraud, his remedy was on the bond."

3d. The Court erred in refusing to give the following charge as requested: "The jury must look to the bond for titles given by Stamper to Ransome to ascertain what Stamper agreed to do. They must look to the bond given by Ransome to Christian to find out what Ransome agreed to do. The writings are the evidence of the contract between the parties, and they are bound thereby unless the evidence sworn to on the trial will warrant the jury in setting aside the written contract and setting up a different contract as actually agreed on between the parties, or that something was left out of the writing, or that a different contract was written or signed by mistake of both parties, or through the fraud of complainant."

4th. Because the Court erred in giving the following charge: "A contract, the specific performance of which will be enforced by a Court of equity must be a fair and just one and the party seeking to have it enforced must clearly prove the contract, and also compliance on his part with his obligation. If he was to pay money, he must prove the payment. If, in this case, the condition of the agreement wa

that Stamper was to convey lot number eighty-five to Ransome, and Ransome was to convey lot number seventy-four to Christian, Christian must show that Stamper has executed a conveyance to lot number eighty-five before he can require Ransome to convey lot number seventy-four to him. If Ransome did not know the contents of the bond he made, whether he was prevented by sickness, mistake or fraud, he is not bound by it; and if it was not written, as the parties agreed that it should be, it should be reformed to meet the intentions of the parties just as though it had been written as intended. If Ransome understood the contract he made only bound him to execute titles to lot number seventy-four to Christian, when Stamper should make him titles to lot number eighty-five, and Christian knew that Ransome so understood it, it is to be considered as Ransome understood it even if Christian understood it differently. If the jury believe, from the evidence, that the agreement between the parties was that Ransome was to make a bond for titles conditioned on Stamper's making him titles to lot number eighty-five, but that Christian, by fraud on his part, obtained from him an absolute bond, they must find for defendant."

5th. Because the Court erred in the following charge to the jury: "It is insisted for the complainant that the bond of Ransome to him contains all the contract; that the consideration therein expressed was all of the consideration for said bond; that it has been paid; that he has fully complied with his part of the contract, and is therefore entitled to a specific performance on the part of Ransome of his part. For the respondent it is insisted that the bond does not contain all the considerations of the contract as actually entered into and intended by the parties; that by the fraudulent contract of the complainant and Stamper, he was induced to sign the bond without examination or knowledge that it was absolute, and that the consideration for his bond was the making to him by Stamper of a good title to lot number eighty-five, all of which Christian not only knew but was concerned and interested with Stamper in the negotiations and final consumma-

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tion of the contract. If you believe from the evidence which has been submitted to you, that the only consideration to the bond of Ransome to Christian was the one expressed therein, and had been received by Ransome; that complainant has fully performed all he was to do, then complainant is entitled to a specific performance on the part of Ransome of his contract, and you should so find. But if you should come to the conclusion from the evidence that the consideration named in the bond was not the only consideration therefor, but by the fraud of Stamper and Christian part of the consideration was left out of the bond, and that the real consideration therefor was that Stamper should make to Ransome a good title to lot number eighty-five, then, until that is done, the complainant is not entitled to a specific performance, and you should so find. The complainant is not entitled to a specific performance on the part of Ransome until the terms on his side are complied with. In determining this question you should consider all of the evidence submitted to you by both parties.

The Court charges you that a written contract between parties cannot be added to, altered or changed by oral testimony, unless attacked for fraud, mistake or accident, and that unless the evidence in this case shows that by the fraudulent conduct of Stamper or Christian, or both, the bond of Ransome did not contain all of the contract between them, or by accident or mistake stipulations were left out, and by this means the contract intended by the parties was not expressed, the bond is to be taken as expressing the contract. In coming to a conclusion on this question, the acts of Ramsome, Stamper and Christian and their connection with each other are all to be considered. By the amended answer the respondent prays for a rescission of the entire contract and a decree for the refunding of the \$1,000 paid by Ransome, on the ground of the alleged fraud of Stamper and Christian, in the procurement of the bond. If you believe, from the evidence, that Stamper and Christian combined and confederated together to practice a fraud upon Ransome, and by fraud and over-reaching ob-

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ined his bond for title to lot number seventy-four and the 1,000, and that they were jointly concerned therein, you should decree such a rescission and repayment; but unless the evidence should satisfy you not only of a fraud upon Ransome alleged, but also the connection of Christian therewith, and that he was jointly concerned with Stamper in its perpetration, you could not make such a decree against him, (Christian.) Christian would not be liable for money paid to Stamper even if there was a fraud committed by Stamper, unless he was a party to the fraud, or in some way connected with it."

6th. Because the jury found contrary to the evidence and principles of equity and justice.

The evidence is omitted as unnecessary to an understanding of the decision of the Court.

The motion for a new trial was overruled and plaintiff in error excepted.

HOOD & KIDDOO; H. FIELDER, for plaintiff in error.

JOHN T. CLARK, for defendant.

WARNER, Chief Justice.

This was a bill filed by the complainant against the defendant, praying for the specific execution of a contract for the purchase of lot of land number seventy-four, in the sixth district

Early county. On the trial of the case the jury found a verdict for the defendant. A motion was made for a new trial on the several grounds set forth in the record, which was overruled by the Court, and the complainant excepted. In our judgment the objection to the interrogatories of Stamper was well taken and they were properly suppressed by the Court. The interrogatories were returned by the witness Stamper to a former Clerk of the Court in *vacation*, and had the following written on the back of them: "Received of M. W. Stamper within package, who says that he received them from one of the commissioners, and that they have been unopened and

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unaltered. Sworn to and subscribed before me, this 18th of March, 1871, W. H. DuBose, Clerk." This affidavit of Stamper was not signed by him. It was shown by the present Clerk, that he, some time after the last term of the Court and DuBose, the former Clerk, found the package in an iron till on the floor in the corner of the room in the Clerk's office that DuBose handed it to him, and that it had been in his possession ever since unopened and unaltered. The former Clerk (whose absence was not accounted for) was not introduced to account for the package from the time he received it in vacation up to the time it was found in the iron till upon the floor and delivered to the present Clerk. In the first place, the interrogatories were not received in *open Court* as required by the 3834th section of the Code. Secondly, Stamper did not sign the affidavit when he returned them to the Clerk in vacation; and thirdly, the custody of them was not accounted for from the time they were received by the former Clerk in vacation, until found and handed to the present Clerk. To allow interrogatories to be received and remain in evidence under this statement of facts would be to establish a dangerous precedent, the more especially when the interrogatories, as in this case, were returned by the witness himself, who was *interested* in the litigation as is shown by the record. It appears from the evidence had on the trial that the defendant, on the 11th day of May, 1863, executed his bond to the complainant in the sum of \$2,000, conditioned to make him a title to lot number seventy-four, in the sixth district of Early county, by the first day of January, 1866. There is no special allegation in the complainant's bill for invoking the aid of a Court of equity to decree a specific execution of this contract, or why his common law remedy for a breach of the bond was not adequate and complete; but the defendant does not appear to have raised that question. He answered the bill and alleges that he made a contract with Stamper to exchange with him lot of land number seventy-four for lot number eighty-five; that as Stamper had not paid Mitchell's estate for lot eighty-five, he did not have the title

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then to convey to the defendant, but would in a short time pay the money and procure the title, and in the meantime each party should execute their bonds to make titles to the respective lots of land. The negotiation for the exchange of the two lots of land was mainly conducted by Christian on the part of Stamper. On the 30th April, 1863, Stamper wrote the following letter to the defendant:

"MR. JAMES B. RANSOME—*Sir*: Upon consultation, and my own opinion, it will be well to give bond, as I have no deed. You can make Dr. Christian a deed or give him a bond to make title when I make you a title. I make a bond to make title when the note is due, you make *one* and send the bond by the Doctor."

It is quite clear, we think, that the trade was made for the exchange of the lots of land between the defendant and Stamper; they in fact were the contracting parties. Stamper executed his bond to the defendant on the 28th of April, 1863; conditioned to make him a title to lot number eighty-five by the first day of January next, after the date thereof.

The defendant alleges, in his answer, that the complainant fraudulently procured the bond to be made payable to himself, instead of to Stamper, with whom the contract was made unconditional, as therein specified, without reciting the terms of the contract between him and Stamper for the exchange of the two lots of land, and that Stamper never paid the money to the Mitchell estate, and departed this life without having procured a title to lot number eighty-five, and that it would be inequitable and unjust to require the defendant to specifically perform the contract under this statement of facts.

On the trial the evidence was conflicting as to the manner in which the bond to the complainant was procured from the defendant, but there is one leading and controlling fact stamped on the face of this transaction, and that is, that the contract for the exchange of the lots of land was made between Stamper and the defendant, whatever part Christian, the complainant, may have acted in the matter. Mere inad-

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equacy of price, though not sufficient to *rescind* a contract may justify a Court in *refusing* to decree a specific performance. So also any other fact, showing the contract to be *unfair* or *unjust*, or against *good conscience*. Code, sec 3134. In view of the facts of this case, as disclosed in record, we cannot say that the verdict of the jury was contrary to the evidence and the principles of justice and equity nor do we find any material errors in the charge of the Court to the jury, or in the refusals to charge as requested. In judgment, the motion for a new trial was properly overruled. Let the judgment of the Court below be affirmed.

WESTLEY TATE, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

1. On the trial of an indictment for murder, where there is a plea of not guilty, it is not error as against the prisoner for the Judge to charge the jury as to the law of justifiable homicide, even though from the evidence, it is plain that the prisoner is in any event guilty of manslaughter. An error of the Court in his charge to the jury, which could not, in any view of it, have injured the prisoner under the verdict, is no ground for a new trial.
2. When the evidence showed that, without any considerable provocation the prisoner "went at the deceased with an axe," and the deceased standing in his place, picked up a heavy oak stick, and was struck by the prisoner with the axe and killed as he was raising the stick, the Judge charged the jury that if the deceased picked up the stick to defend himself, the prisoner was guilty of murder; but if the deceased picked it up for *mutual combat*, the prisoner was guilty of manslaughter; and the jury found the defendant guilty of murder. *Held*, That the charge was not one of which the prisoner could complain.
3. There need not be mutual blows to constitute a mutual combat. There must be a mutual intent to fight, and if this exists and but one blow be stricken, the mutual combat exists, even though the first blow kills or disables one of the parties. (R.)

Criminal law. Murder. Charge of Court. Immaterial error. Evidence. Before Judge ANDREWS. Elbert S. Senior Court. September Term, 1871.

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Westley Tate was placed upon trial for the murder of Jefferson Tate. The defendant pleaded not guilty.

The following evidence was introduced upon the trial :

TESTIMONY FOR THE STATE.

MARION TATE, (colored) sworn: I think it was about sunset or between sunset and dark on Tuesday of last week; it was at the Ragland place in Elbert county; on that day Westley Tate struck Jefferson Tate with a pole axe; he hit him on the right side of the head, near the top, more to the right than left. I think he hit him with the head of the axe; it appeared like a pretty heavy blow; knocked him down; the wound was about an inch and a half wide and three and a half or four inches long; can't tell how deep it was; the skin was broken in one small place; was not able to get up; they took him up, spoke to him, called him and he did not answer. They carried him into the house and laid him down; he was knocked down on Tuesday and he lived until Thursday morning; he died in this county. I did not see the commencement of the difficulty between them two; the fuss commenced about some "jowering" about some children; the women were West's wife, Muly and July, Jeff's uncle's wife; West. was there before Jeff. came. When the killing took place Jeff. came up and set his basket down and goes in the house and gets a drink of water; when he got the water he came out and walked to the wagon, where his basket was; he stood some few minutes leaning against the wagon, when he spoke to West. and said to him, "I don't think it right for you to curse another man's wife in her yard;" don't remember what he had been saying before that; don't remember what West. was doing; the women and defendant got in a great rage; Jeff. spoke to defendant first; he told defendant that he did not think it was right for one man to be cursing and talking about killing another man's wife in her yard; West. asked him, "Did he take it up?" Jeff. told him, "No! he didn't take it up in particular, more than he didn't think it was right;" West.

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then told Jeff. "That he would hit his wife," and Jeff told him "I reckon not;" Jeff. said, "I think God give you more sense than to hit his wife if he were in some foreign country;" there was some few words passed between West. and Jeff. that I don't recollect. West. started to Jeff.; I never saw him; I heard him walking and talking back behind me; don't think that from the time until West. got half way there was another word spoke between them; I was sitting with my back to West. and face towards Jeff.; when I looked I saw Jeff. stoop after the double-tree, and as the double-tree was coming up I saw West.'s axe coming under the double-tree; he had raised the double-tree up when he struck; by the time he got the double-tree nearly straight West. struck Jeff. on the right side of his head with his axe; Jeff. and the double-tree all fell backwards and lodged on the hub of the wagon. At the time they commenced talking to each other I think they were fifteen or twenty steps apart, or more; don't think Jeff. moved out of his tracks; didn't examine to see whether the skull was broke or not. After West. knocked Jeff. down he walked off from there very quickly; Jeff. was standing at the fore-wheel of the wagon; the double-tree was separate from the wagon; he caught the double-tree up with both hands; it was a double-tree for a two-horse wagon, the usual size.

Cross-examined: I could kill a man with a weapon like that double-tree; I reckon the double-tree was nearly four feet long; it was lighter than a four-horse double-tree; the double-tree was lying on the ground, nothing attached to it; Jeff. was on the left side of the wagon; the tongue was towards the house; Jeff. was on the upper part of the wagon, on same side with witness, leaning against the fore-wheel; he was standing up between the front wheel and the tongue; there was no part of the wagon between witness and deceased; witness was on the same side of the wagon with deceased; deceased was leaning against the basket of cotton and the wagon; the basket was sitting on the wagon wheel; the deceased and wagon were three or four steps from the witness; I was sit

ting on a work-bench some five or six steps from the house ; don't know how long I had been there before the difficulty ; when I got there there was a difficulty between Muly and July ; heard them "jabbering" after I got there ; they were "jabbering" about Muly's baby and July's brother ; they had been quarreling ; don't know how long they had been quarreling before West. came up ; witness hadn't been there very long before West. came up ; they were quarreling about July's brother knocking down Muly's baby in play and hurting its face while they were playing ; Muly was in the family way ; she has had a baby since, so I have heard ; I heard she had a baby the next night from the chat. When West. came up he picked a chunk and started to knock her down with it for the fuss his wife and she was in ; he never knocked her down that I saw ; if he had have done it witness would have known it ; didn't see West. when he came up ; he came before Jeff. West. had been pulling fodder that day ; deceased, defendant and witness live on the same place ; witness and defendant live in the same inclosure ; Jeff. lives three hundred and fifty or four hundred yards on the other side of the branch ; the gin-house is on this side of the branch ; gin-house some four or five hundred yards from where difficulty took place ; West. was foreman on the place ; don't know what privileges he had ; I worked with my own squad ; Jeff. had a squad of his own ; Jeff.'s wife came with him and came by there ; it was on the way to the gin-house ; no quarrel had taken place between defendant and Jeff.'s wife ; I heard that West. brought an axe with him from the fodder field ; Jeff. said to West., after he came out of the house and lent up to the wagon wheel, "West., I don't think it is right to curse another man's wife in her yard, and talk about killing her ;" I know that West. did not speak to him first ; I think West. asked him, "Did he take it up ?" Jeff. told him, "No ! not particular, but he didn't think it right ;" West. told him, I think, "He would hit his wife ;" Jeff. laughed, and said, "No ! I think God gave you better sense than that ; I don't think you would strike my wife if I was

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in some fur country ;" don't know why West. said he would strike his wife; nothing had passed between West. and Jeff's wife. When he was struck with the axe he fell back and lodged against the hub, on the outside of the wheel on the left, and the double-tree fell on the left of him ; defendant and deceased were about the same size ; witness recognizes prisoner as the one that struck deceased with the axe ; July lived in the same inclosure and same yard ; I saw nobody but Jeff.

JIM MARTIN, (colored) sworn : Was present at a difficulty between Jeff. Tate and West. Tate, at Mr. Tate's " Ragland place," in Elbert county, on Tuesday evening of last week ; as we came up from the fodder field some women were quarreling about some children ; West. came and heard them quarreling and took it up ; West. Tate's wife, Muly Tate, and July Tate were the women that were quarreling ; West commenced cursing Aunt July in her yard, and Jeff spoke and told West that " He didn't think that he was doing right to curse a woman in her yard ;" Jeff. told him that " He didn't think that he would like for any man to go in his yard and curse his wife that way ;" West. spoke and told him that he " would curse his wife or any other God damned man's wife that was standing on his toes ;" Jeff. told him, " I reckon not, West. ; I might go to some fur country or other and God gave you better sense than to hit my wife ;" West. said, " God damn you, I'll show you, you God damned yellow rascal ;" then he made to him with the axe ; Jeff. stooped down to get the double-tree and before Jeff. got exactly straight with it West. hit him on the right side of the head with the axe ; he knocked him down ; he first fell on the wagon hub and lay there a few minutes and then fell on the ground ; he knocked him down with a pole axe ; he hit him with the butt of the axe ; he hit him on his head, on the right side of his head near the top of his head ; witness recognizes prisoner as the one that struck deceased with the axe. After West. knocked Jeff. down he threw down his axe and walked a short distance, then struck a little trot

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I saw no more of him until I saw him in jail. After Jeff. fell on the ground we picked him up and carried him in Oliver Tate's house; he lived until Thursday morning after he was knocked down; I was with Jeff. nearly all the time after he was struck until he died; he did not talk any; he was speechless; never heard him speak from the time he was knocked down until he died; I looked at the wound; it broke the skull; did not notice how long the wound was; it was about three inches long and about an inch wide, I think; don't know how much the axe was worth; more than twenty-five cents.

Cross-examined: I work on Mr. Tate's place with prisoner's squad; deceased worked in separate squad; worked in same field that day but not together; West. was stacking fodder and Jeff. was picking cotton; West. went from the fodder field that night home; witness and prisoner went together from the fodder field to the yard where the killing took place, and found Muly and July quarreling; nobody there but Muly and July that I saw; nobody with me but West.; West. carried an axe with him from the field that he had been using; the axe with which he killed Jeff.; we had been there about ten minutes when Jeff. came up; the quarrel continued between the two women and was going on when Jeff. came up; the women were quarreling about West.'s wife's little boy; the children had not been fighting; I heard them say that July's brother run against Muly's little boy and knocked him down; July's brother was about as high as the middle of witness' breast; Muly's child was about three years old, the one that was knocked down; the women talked angrily; Muly, West.'s wife, was in the family way, and had a child the next night, I think; July is a large size woman, twenty-five or six years old; Muly is a right smart smaller than July. West. struck under the double-tree with the axe; the whole width of the head of the axe struck into his skull far enough to break it; he struck very near the crown of the head; it was the double-tree of a two-horse wagon, usual size; could kill a man with it by striking pretty hard; Jeff.

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brought his basket of cotton and set it on the wagon; he was going to the gin-house with it; that was the way to the gin-house; not related to any of the parties; deceased died in Elbert county. West. was standing twenty-six steps from Jeff. when they were quarreling; I was standing by West. I don't know the distance from where I was standing with prisoner to deceased; West. was as far from Jeff. as from the place where witness is standing to Tate's store; don't know that the distance was measured; Jeff. stood in the same place all the time; the women were quarreling in Oliver Tate's yard; it was three or four hundred yards from Oliver Tate's house to West's house; Jeff. never moved out of his tracks West. moved all the way from where he was standing to where Jeff. was; he walked and talked pretty fast when he went up to where Jeff. was. West. came on from the fodder field by home and on to Oliver's house; he never stopped at home.

JACOB BURTON, sworn: I assisted in arresting the prisoner; we arrested him last Friday night, in South Carolina at Mr. McCalla's quarters; had no warrant for his arrest he made no resistance; there were nine of us, two with Mr. Blackwell and Colbert.

The defendant introduced no evidence. Admitted that Jefferson Tate is dead, and that he died from the wound inflicted by defendant.

The jury found the defendant guilty of murder.

The defendant moved for a new trial upon the following grounds, to-wit:

1st. Because the Court erred in charging the jury, "the provocation by threats will not be sufficient to reduce the crime from murder to manslaughter, when the person killed is unarmed and neither making or attempting any violence upon the prisoner at the time of the killing, provided nothing was said or done to excite that irresistible passion before commented on."

2d. Because the Court erred in charging the jury, "th

that which is perfectly justifiable on the part of the deceased cannot be any legal provocation to the slayer."

3d. Because the Court erred in giving in charge to the jury sections 4265 and 4267 of Irwin's Revised Code, as the defense set up in the case was that the killing was voluntary manslaughter.

4th. Because the Court erred in charging the jury, "that if they believed from the testimony that the prisoner was advancing on the deceased with a declaration, God damn you, I'll show you, you God damned yellow rascal, and with an axe, that the deceased was justifiable in taking up a double-tree of a two-horse wagon to defend himself from the attack, and if in so doing was killed by the prisoner by a blow on the head with an axe by the prisoner, this using of the double-tree does not free the prisoner from the crime of murder; that it depended on the spirit with which the double-tree was seized whether for mutual combat or self-defense."

5th. Because the Court erred in giving in charge to the jury, "that provocation by threats will not be sufficient to reduce the crime from murder to manslaughter, when the person killed is unarmed and neither making nor attempting any violence upon the prisoner at the time of the killing."

6th. Because the Court erred in refusing to charge the jury as requested: "That if the jury believed from the evidence in the case, that the prisoner and the deceased, upon a sudden quarrel, both seized weapons likely to produce death, and the prisoner killed deceased, then the killing was voluntary manslaughter and not murder; and it is immaterial who struck the first blow;" and in charging the jury as follows: "It depends upon the circumstances under which the weapons were seized; if for mutual combat, it matters not who struck the first blow; but if the jury believed that Jeff. seized the double-tree standing in self-defense, and for that purpose, it would not reduce the homicide to the grade of manslaughter; and the cases read by defendant's counsel to sustain this request are those of mutual combat; so the Court charges you, if you believe Jeff. seized the double-tree for self-defense, it would

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not reduce the offense to manslaughter; but if you believe he seized it for mutual combat the offense is reduced to that crime only. And in all cases of mutual combat the mutual intent to fight must be a mutual purpose in the parties simultaneously, and to constitute a case of such combat mutual blows must pass between the parties."

7th. Because the Court erred in refusing to charge the jury as requested as follows: "If the jury believes from the evidence in the case, that the prisoner and deceased were engaged in a mutual quarrel, and prisoner seized an axe but did not strike until the deceased had seized a double-tree, a weapon likely to produce death, and had put it into a striking position and the prisoner then struck him, then the killing was voluntary manslaughter, and not murder;" and in repeating his charge to the jury as set forth in the sixth ground of complaint.

8th. Because the verdict was contrary to law and to evidence.

The motion for a new trial was overruled by the Court and defendant excepted, and now assigns said ruling as error.

J. D. MATHEWS; EDWARDS & SHANNON, for plaintiff in error. 1st. The first and fifth charges to the jury are upon assumed state of facts: 11 Ga. R., 286; 14 *Ib.*, 137; 30 *Ib.*, 271, 714. 2d. The second charge was an intimation of opinion upon the evidence: Code, sec. 3183; 14 *Ib.*, 137. 3d. The third charge excluded manslaughter from the consideration of the jury: 20 Ga. R., 594. 4th. Error to refuse requests to charge as to mutual combat: Code, sec. 3664; 1 Russ. on Crimes, 584; 15 Ga. R., 223. 5th. Evidence shows no malice: Code, sec. 4254; 3 Ga. R., 324; 1 Russ. on Crimes, 482; Ros. Crim. Ev., 684; 30 Ga. R., 67; 15 *Ib.*, 223; 25 *Ib.*, 527; 42 *Ib.*, 609. 6th. Homicide to prevent assault and battery is voluntary manslaughter: 18 Ga. R., 194; 24 *Ib.*, 282.

SAMUEL LUMPKIN, Solicitor General; ROBERT HESTES for the State. 1st and 5th. The charge complained of i

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law: 25 Ga. R., 207; Reese's Hom., 31. Misdirection upon abstract principle of law immaterial: 31 Ga. R., 426; 17 *Ib.*, 194; 22 *Ib.*, 237; 28 *Ib.*, 215; 41 *Ib.*, 485. 2d. The second charge is good law: 29 Ga. R., 470; 34 *Ib.*, 85. 3d. The third charge is more favorable to plaintiff in error: 41 Ga. R., 485. 4th. This is not a case of mutual combat.

McCAY, Judge.

This was an indictment for murder, and there was a plea of not guilty generally. Under the proof, we think it was no error in the Court to charge the law of justifiable homicide. The record shows a general denial of guilt, and it was not improper that the Judge should inform the jury under what circumstances one may lawfully kill another, and it would be a strong case of hypercriticism to say, that a new trial ought to be granted if the Judge allude to instances of justification wholly unlike the case on trial. It is common for the Court to read the definition of justifiable homicide, "the taking a human life by *commandment* of law, or by *permission* of law, or in self-defense;" surely it is not error in the Court to do this, even though the case is one of self-defense alone. That the Judge in *this* case charged the jury in reference to the law of justifiable homicide, etc., was no harm to the prisoner. In the first place, his plea was "not guilty;" the proof was very plain that the deceased was killed by him, and he was "guilty" unless justified. In the next place, we have no evidence from the record, that his counsel waived his plea of not guilty, and stood only on a denial of the guilt of murder; as the record stands the case was of any guilt. We are not prepared to say, that if the record showed that the counsel had, in the argument, admitted guilt of manslaughter, that the charge of the Court as to justifiable manslaughter would have been ground for a new trial. At best the charge may in that event have been unnecessary. But we are not clear it could even then be said to have injured the defendant. We think the Judge

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was in error in saying there must be mutual blows to constitute a mutual combat. There must be a mutual intent to fight. But we think if this exists, and but one blow be stricken, that the mutual combat exists, even though the first blow kills or disables one of the parties. Were there *any evidence* here of a mutual combat we should be constrained to reverse the judgment. But we are clear that there was before the jury nothing to authorize any doubt even upon their minds that this was not a mutual combat. The deceased showed no sign of a disposition to fight. He denied taking up the quarrel of the woman. He stood at his place; he had, or showed no arms. Indeed, he seems to have been very slow even in getting ready to defend himself, since the defendant had about twenty steps to go, and got to him and struck him before he got the double-tree picked up, and in a position even to defend himself. Had he got the first blow and that blow proved fatal, the killing would by him have clearly been justifiable. He sees a man coming at him with an axe, cursing him, threatening to show him what he could, and would do, and his picking up the double-tree and raising it was nothing but the promptings of that universal feeling of self-defense implanted in all animal nature.

The conviction is right; it was not justified only, but demanded by the testimony. The jury were bound, on their oaths, to find as they did, and we do not feel it to be our duty to grant a new trial, because the Judge gave the law wrongly upon a state of facts which did not exist. This offense was murder. There was no considerable provocation—nothing to bring it to the grade of manslaughter.

Judgment affirmed.

CHARLES F. ELLIOTT, plaintiff in error, vs. THE STATE,
defendant in error.

1. The grounds of alleged error, set forth in the motion for a new trial, must be identified by the Judge as true, or they will not be considered on a writ of error based thereon to this Court. The usual certificate to the bill of exceptions is not sufficient. (R.)

2. In a case where, if death had ensued, the defendant would only have been guilty of manslaughter, he cannot be convicted of an assault with intent to commit murder, and the Court, on request, should so have charged the jury. (R.)

Criminal law. Assault with intent to murder. Bill of exceptions. Practice in the Supreme Court. Malice. Before Judge HOPKINS. Fulton Superior Court. October term, 1871.

For the facts of this case, see the decision.

D. F. & W. R. HAMMOND; PEEPLES & HOWELL, for plaintiff in error.

J. T. GLENN, Solicitor General; GARTRELL & STEPHENS, for the State. 1st. The verdict of the jury was in accordance with the law, and was sustained by the evidence, and ought not to be disturbed by this Court. 2d. The Court was right in charging the jury that, "in cases of assault, as in all other cases, if several act in concert, encouraging one another and co-operating, they are all equally guilty, though only one makes the actual assault: 33 Ga. R., 131; 21 Ga. R., 21; Code, 4240; 30 Ga. R., 757. 3d. It is immaterial whether the prisoner is charged in the indictment as principal in the first or second degree, if he was found aiding and abetting the act: 28 Ga. R., 604. 4th. Malice is implied from the recklessness of the act, and it is not necessary to institute malice that the prisoner should know the person against whom it is directed; 39 Ga. R., 31; 26 Ga. R., 275. 5th. The Court was right, in his construction of sections 4264 and 4268 of the Code, also of section 4265; section

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4267 did not apply to the case, but if it did, the Court's construction of it was right, and the charge, as given, did not injure the defendant: 22 Ga. R., 234; 18th *Ibid.*, 708; 2 Bishop's Crim. Law, sec. 638.

WARNER, Chief Justice.

The defendant was indicted for an assault, with intent to murder. On the trial of the case the jury found the defendant guilty. A motion was made for a new trial on the several grounds stated in the motion therefor, as contained in the rule *nisi*. First, because the verdict of the jury was contrary to law. Second, because the verdict of the jury was contrary to the evidence, and decidedly against the weight of the evidence. Third, because the Court erred in charging the jury, and in refusing to charge the jury as requested as set forth in the motion for a new trial. The Court overruled the motion for a new trial, and the defendant excepted. On what ground the Court overruled the motion for a new trial does not appear. The error assigned in the bill of exceptions is the overruling the motion for a new trial. Whether the Court charged the jury, or refused to charge the jury as assumed in the motion for a new trial, does not affirmatively appear; and it may be that the Court overruled the motion for a new trial because the facts assumed therein in relation to the charge of the Court, and refusal to charge as requested, were not true. But it is said the certificate of the presiding Judge furnishes plenary evidence of the truth of the grounds of error stated in the motion for a new trial. The certificate of the Judge certifies that the foregoing bill of exceptions is true, and contains all the evidence material to a clear understanding of the errors complained of. What was the exception to the ruling of the Court, and what was the error complained of? The exception to the ruling of the Court and the error complained of was the overruling the motion for a new trial, and the Judge certifies that the motion for a new trial was made and overruled, and that the bill of exceptions contains all the evidence material to a clear

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understanding of the errors complained of—that is all. Whether the Court charged the jury, or refused to charge the jury as stated in the motion, does not affirmatively appear in the bill of exceptions, and, therefore, the certificate of the Judge does not cover it. The certificate of the Judge only certifies that the motion for a new trial was overruled, and that the evidence contained in the bill of exceptions is all that is necessary to a clear understanding of the errors complained of in overruling the motion, on the ground that the verdict was contrary to that evidence, and to the law under that evidence. The bill of exceptions must affirmatively disclose the error assigned: *Doebler vs. Waters*, 30 *Georgia Reports*, 344; *Cameron vs. Ward*, 22 *Georgia Reports*, 169. In *McLain & West vs. Dinsmore & Kyle*, 30 *Georgia Reports*, 724, this identical question was considered and decided. In delivering the opinion of the Court, Lumpkin, Judge, said that the case furnished another fit occasion to remind the bar of the necessity of taking the precaution to obtain the acknowledgment of the presiding Judge, that the *grounds* taken on the motion for a new trial are *true*. Not that the motion was made upon the grounds stated in the rule; but that *the statements in the grounds are true*. The result, therefore is, that in the case now before the Court, no other errors can be considered but those which relate to the overruling the motion for a new trial, on the grounds that the verdict of the jury was contrary to the evidence contained in the bill of exceptions, and contrary to the law under that evidence.

If the Court did charge the jury, and did refuse to charge the jury as requested, as assumed in the motion for a new trial, that should have been distinctly stated in the bill of exceptions, so that the presiding Judge could have certified whether it was true or not. The entire Court are unanimous in judgment as to the rule of practice, but inasmuch as no objection was made, on the argument of this case before the Court as to the assignment of errors, as alleged in the motion for a new trial, the majority of the Court place their dissent of concurrence in the reversal of the judgment of

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the Court below on that ground. I place my judgment of reversal upon a much broader ground. Was the verdict of the jury contrary to law, under the evidence contained in the bill of exceptions? The defendant was charged with an assault with an intent to murder. In order to make out the offense, the evidence must show that the assault was made under such circumstances that, if death had ensued, the killing would have been murder, which necessarily would have involved the question of malice, either express or implied. If death had ensued, and the homicide would only have been manslaughter, then the defendant cannot legally be found guilty of an assault with intent to murder.

What are the material facts, as disclosed by the evidence in the record? The defendant is the brother-in-law of Miss Turner, a young lady about eighteen years old, who lived with her parents in the city of Atlanta. She had received a communication through the post-office, written over a fictitious name, requesting her to meet a gentleman on the street at a certain time; this she communicated to her mother and brothers; her mother threw it in the fire. Shortly afterwards a proposition was made to her through a negro man and his wife, to meet a gentleman on the street at a certain time and place, who desired to make her acquaintance. This she communicated to her mother and family. The name of the gentleman was not disclosed. Her brothers desired her to go to the place designated, and they would go with her and find out who it was that was sending such insulting messages to their sister. She went, her brothers and the defendant, her brother-in-law following a short distance behind, when Clark, the prosecutor, made his appearance, piloted by the negro man and his wife, through whom the communications to her had been made. She says he took hold of her hand, put it through his arm and pulled her along. The prosecutor says she took his arm, and he asked her how long she could stay out. She says he asked her how long she was going to stay out that night, and would she go to his room or to an Sallie's, the negro's house, and also said, "Let us walk fast

About that time the defendant and her brother came up, and her brother said, "Turn my sister loose," and repeated it the second time, and then commenced firing upon him, wounding the prosecutor in two places. The evidence is not clear that the defendant fired at all, but he was there and was evidently acting in concert with the brother, who did shoot the prosecutor. The prosecutor denies writing the note through the post-office, but admits sending the messages through the negroes, and that his object in meeting the young lady was to have criminal intercourse with her.

Such, in brief, are the substantial facts and circumstances under which the shooting took place. If death had ensued, would the killing have been murder, or manslaughter, under the law? There could not have been any express malice against the prosecutor, for the defendant did not know who he was—his name had been carefully concealed. Will the law imply malice under the provoking circumstances attending this transaction?

In all cases of voluntary manslaughter there must be some actual assault upon the person killing or an attempt by the person killed to commit a serious personal injury on the person killing, or *other equivalent circumstances*, to justify the excitement of passion and to exclude all idea of deliberation or malice either express or implied: Code, section 1259. Were not the circumstances under which the shooting was done equivalent to those specially mentioned in this section of the Code to justify the excitement of passion and to exclude all idea of deliberation or malice, either express or implied. The brother and brother-in-law of their sister discover, for the first time, the individual who has been sending insulting messages to her, and who was then in the very act of carrying out his purpose, as he himself admits, to invade her chastity. If this would not justify the excitement of passion in the breast of a brother or brother-in-law of a young sister who had a right to claim their protection, what would? But it is said the expressions uttered by the defendant to the prosecutor, in his room shortly after the shooting,

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"that he had received a dose, and when his brother came he would finish him or finish it," is evidence of malice. On the contrary, it shows that the defendant was still under the excitement of passion aroused and produced by the conduct of the prosecutor toward his sister, and that his words gave expression to it when he came into his presence.

In my judgment, the evidence in the record does not make such a case that if death had ensued, the defendant would have been guilty of murder under the law, and, therefore, he should not have been found guilty of an assault with intent to murder. If the jury had found the defendant guilty of an assault only, then there could have been no objection to the verdict. Whilst the Courts cannot, and should not, recognize the right of any person to take the law into their own hands for the purpose of redressing their own wrongs, still the seducer, when he attempts to invade female chastity, should distinctly understand that he encounters all the peril incident to such an attempt on his part. If the prosecutor in this case had confined himself to the pursuit of his legitimate and lawful business, instead of seeking to gratify his carnal appetite in forbidden pastures, he would not probably have been injured. I am, therefore, of the opinion that a new trial should be granted in this case, on the ground that the verdict of the jury is contrary to law, as disclosed by the evidence in the record.

Let the judgment of the Court below be reversed.

MCCAY and MONTGOMERY, Judges, concurring.

The bill of exceptions in this case contains no history of the trial, no statement of any of the rulings of the Court in the progress of the cause. It is simply a statement that the case was tried, a verdict had, a motion made for a new trial, and that the Court refused to grant the new trial. We are left, therefore, to the record *alone* to discover the errors, if any, of the Court. That record is simply the rule *nisi* and the judgment of the Court refusing the new trial. The rule *nisi* calls on the State to show cause why a new trial should

not be granted, on the following grounds: 1st. Because the Court did so and so. 2d. Because, etc. The plaintiff has a right to put in his motion any ground for a new trial that he may think he has, and, though some of the Judges are in the habit of refusing even the rule *nisi*, unless the facts stated are true, yet this is not always the case, and is, in fact, only a new practice. We have frequently before us judgments refusing to make such rules *nisi* absolute, on the ground that the facts stated are not true. Most generally, however, the judgment simply grants or refuses the new trial, giving no reasons for it. It may be that the reason for refusing is, that the grounds taken are untrue. How are we to know? But in this bill of exceptions there is a distinct assignment of error, on this ground, taken in the rule *nisi*, and the parties went into the argument before this Court that this assignment was supported by the record. Judge MONTGOMERY and myself think it was too late to make this objection in the argument. It should have been done on the reading of the bill of exceptions, the real objection being that the bill of exceptions was not sustained by the record. We will not, therefore, in this case, refuse to consider the points.

As this was a case of assault with intent to murder, it is clear that if there was no malice, express or implied, the defendant was not guilty. The Court was asked, in substance, so to charge, and he refused to do so. We think that was error. The evidence is such as that the jury might have found the shooting to be the result of that sudden heat of passion which does not allow the voice of reason and justice to be heard, and that if the shooting had produced death, the offense would have been manslaughter.

We cannot agree with the Chief Justice that the evidence fails to show such malice, as if the charge had been given the jury would have been bound to find the defendant not guilty in any event. We think there is plenty of evidence to justify a verdict of guilty, even under a proper charge. The acts that this lady went to the rendezvous with the knowledge of her friends—that they followed her, armed—that this

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defendant was one of the crowd—that he displayed great malignity of feeling when the victim of their violence was apparently on his death-bed, and that he was armed, are, in our judgment, facts that would fully justify a verdict, even had the law been properly given.

But as the jury were not given the law of malice, as requested, we think there ought to be a new trial. The law is clear that, if there be not such malice as would make the shooting murder, had death ensued, but only manslaughter, the defendant is not guilty.

ANDREW M. PARKER, plaintiff in error vs. THE FULTON LOAN AND BUILDING ASSOCIATION, defendant in error.

Where a suit to recover usury paid was brought against a Loan and Building Association, chartered by the Superior Court in favor of one who had been a member and borrower, and who failing to comply with the rules, as to the payment of his monthly dues, had, by way of settlement, conveyed to the company certain real estate at an agreed price in full discharge of his obligations and it appeared in proof that the company consisted of two thousand shares; that \$1 00 per month was to be paid upon each share until the accumulations should make each share worth \$200 00; that the monthly receipts were to be used in advancing to the shareholders on their ultimate interest at such rate of premium as the money might bring at auction, and that each shareholder, taking an advance, was to pay \$1 00 extra upon each share advanced upon, giving a real estate mortgage to secure the performance by him of his agreement to pay his dues as the constitution of the company required:

- Held*, 1. That the contract of a member taking an advance according to the rules, was not usurious *upon its face*, whatever might be the premium at which he agreed to take the advance.
2. Whether such a contract, though *legal* upon its face, was, in fact illegal, would depend upon the object of the association. If it were in truth, a mere device to evade the usury laws, then it would be illegal, if in fact more was taken for the use of money than seven per cent per annum. But if the organization were in fact and *bona fide* a plan with the real intent and object of "accumulating a fund by monthly subscriptions or savings of the members thereof, to assist them in procuring for themselves such real estate as they may deem proper," then it would not be illegal; and this being a question of fact, depending

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upon evidence, it was proper for the Judge to leave it to the finding of the jury.

2. When no other facts appear to the jury, by the proof, going to show the object of such an association than the Constitution, and the contract made in accordance therewith, a verdict of the jury that the contract is not illegal, is not only supported by, but is required by the evidence.
4. If a contract claimed by one of the parties to be usurious and by the other not, is compromised and settled between them, the question of dispute as to the usury, forming a distinct item of the settlement, this is an accord and satisfaction even as to the usury, and the money paid cannot be recovered back, but a mere compromise and settlement of the debt without a distinct reference to the dispute as to the illegality of the contract is not a bar to a suit to recover back the usury paid.
5. This Court will reluctantly interfere with the discretion of the Judge below in his direction of the business of the Court, and never unless manifest injustice have come to the party complaining.

Loan and Building Associations. Usury. Accord and satisfaction. Practice. Before Judge HOPKINS. Fulton Superior Court. October Term, 1871.

Andrew M. Parker brought assumpsit against the Fulton Loan and Building Association, a corporate body incorporated by an order of the Superior Court of Fulton county, the declaration containing substantially the following allegations: That said Association is indebted to plaintiff in the sum of \$4,605 75 as principal debt, with interest on the same from March 8th, 1868, for so much money by the said plaintiff paid, laid out and expended to and for the use of the said defendant, and at its special instance and request, the said sum of money having been paid to said defendant as usurious interest for the use of money over and above the legal rate of interest. The declaration contained a second count for \$4,605 75 money had and received by the defendant for plaintiff's use.

The defendant pleaded the general issue, and that if plaintiff ever had any demand against said defendant, the same has been by accord and satisfaction, settled and adjusted between defendant and plaintiff, by the purchase of a certain house and lot by defendant from plaintiff at a price agreed

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on between the parties, and on payment of the balance of \$740 00 by defendant to plaintiff, all matters in dispute between them were by such accord settled and determined.

The following evidence was introduced upon the trial: Plaintiff testified that he joined the defendant, and took a few shares of stock. His object in joining was to borrow money from it, knowing that no one could borrow money without having stock to pledge as collateral. As he wished to borrow, from time to time, he got more stock through J. R. Wallace, sometimes paying him par and sometimes a little over par; told Wallace when he wished him to get him stock that he wished to buy it and borrow on it; at various times from September 13th, 1866, to March 8th, 1868, he got money from defendant; first got \$190; bid it off at eighty-one per cent; the last gotten was \$740 on a settlement in part payment for the land which he conveyed to defendant. He does not remember the dates nor amounts of the several separate loans received from defendant, but the total received by him amounted, in principal and legal interest on it to 8th of March, 1868, to something over \$5,000, and paid them back various sums at dates and in amounts not remembered, aggregating, with legal interest added up to 8th March, 1868, to something over \$9,000, leaving a balance over paid of \$3,398. On said settlement defendant paid him \$740 cash, and he conveyed to defendant property valued on the settlement at \$6,500 in settlement of defendant's demands against him. The payments were in consideration of the money he had gotten from defendant.

Cross-examined: When he joined defendant, he was furnished with a printed copy of its constitution and by-laws, and a certificate of stock; each stockholder had to pay \$1 00 per share per month on his stock, and a fine of ten cents for failure whether such stockholder had borrowed or not, and \$1 00 per share per month was paid by him to keep his stock; this stock was like any other stock so liable, on market, for fluctuating prices; when a loan was made, one dollar per month on one share bid off had to be paid for interest, and ten cents on the

per month on failure to pay it; when payments were made, defendant's treasurer gave receipts showing the amount paid itemized. Plaintiff made up the account sued on from said receipts and other data in his possession; cannot remember any sums or the dates, except the first and the last, but knows that the aggregate is about as aforesaid; there is one error in said account, attached to the declaration of \$1,200, in my favor, in one place, and some smaller and immaterial errors in calculations. Money kept up so high in the Association that, at any time within a year from the first borrowing by plaintiff, he could have paid back the identical sum received by him, and gotten his mortgages discharged, and had his stock reinstated, and gotten the accumulation on his stock; the money would thus have cost him no interest; at any time after that, he could have paid back what he had borrowed, plus such sum as, at the then rating rate of premium, would have made a mortgage by some other person equal to his, and gotten his mortgage released, and his stock pledged as collateral also released, and the accumulation on his stock would have exactly equaled the sum required by the Association to be paid in by him. This is not only so theoretically, but plaintiff knows it to be so practically. Had plaintiff kept his whole contract, he would have made, by the accumulation on stock, just what he would have lost by paying the installments required, but he had not the money with which to pay up according to his contract, and for that reason, lost by the contract. On the 8th of March, 1868, he had failed to pay, for five months, his monthly dues, then \$200 per month; he then had a settlement with J. R. Wallace, who was acting for the company, and in that settlement all the items on the bill of particulars sued on were taken into consideration and passed upon. On that day, plaintiff agreed upon the settlement according to the paper exhibit. Defendant then bought plaintiff's stock, as therein shown, paid him 740 cash, and gave up all his mortgages and transferred his stock to defendant, and thus had a full settlement of all their affairs; but in that settlement nothing was said about usury,

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but plaintiff knew what their claim was, and on what account their claim was, what he had gotten and what he had paid; had been a member of such an association before, and was familiar with all its operations.

Re-direct: Being unable to raise money to pay his monthly dues of \$200 per month, for five months, and monthly fines of ten per cent. on the dues, and defendant threatening to sue him, he made said settlement to prevent suit. The average premium on all money borrowed by him was seventy-six per cent. Defendant began business in June, 1866. The amount of cash obtained depended on premium bid. Mortgage for any number of shares bid off was for \$200 per share, without reference to the sum of money actually gotten. The amount procured was ascertained by deducting the price bid from \$100 and doubling the remainder.

Here plaintiff closed.

Defendant introduced J. R. Wallace, who testified as follows: All the stock of the Association was taken the first night. Parker did get him to buy stock for him, and this he did as he bought other things on commission; he is a real estate dealer, purchaser and seller of stocks, etc. Defendant authorized him to settle with Parker, and he made the settlement; the basis of it was as shown by the paper shown him; it is signed by Parker. That settlement was in full of all difference between the parties. Defendant's board of directors had often discussed whether a borrower could successfully plead usury, and, while he is not certain, thinks he and plaintiff spoke of it before settling; he, acting for the company, thought the settlement covered usury, if there was any in the transaction. Nominally, the defendant held plaintiff's obligations for near \$20,000, but plaintiff knew that that was but nominal, and that he was only required to pay his installments. Defendant was well posted about the operations of the Association. The real estate priced in the settlement at \$6,500 was not then worth more than \$5,000; the building on it was very inferior, and property was dull; it was then leased out, and there was

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ans on it; Parker secured them against these liens by
age on his Broad street property, and afterwards paid
liens. About six months after the settlement, de-
sold said property for \$6,500. Property had in-
in value; has often seen a greater increase in six
in Atlanta. Defendant had paid \$120 taxes on it,
nile. The paper shown was written by witness, ex-
it Parker signed it. What plaintiff got, and what he
d, witness did not know. Under the usual operations
an association, it would reach the end contemplated,
en each share would be worth \$200, less forty per
a sixty-six months from its organization.
ndant then put in evidence said paper, which was as
:

“ATLANTA, March 17th, 1868.

M. Parker, to Fulton Loan and Building Association:
ndred shares at 65 per cent, 70.....\$7,000
t of dues supposed to be..... 1,160

.....\$8,160
stock..... 2,200

.....\$5,960
ront store, 21 by 100, now occupied, and pos-
sion to be given 1st June, 1868.....\$6,500

.....\$ 540
him..... 200

.....\$ 740

ill accept the above and make deed in fee simple to
ouse and lot on Whitehall street, now occupied by F.
& Company. (Signed)

“A. M. PARKER.”

ndant then put in evidence, by consent, its printed
ution, as follows:

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“CONSTITUTION.

“ARTICLE I.

“This Association shall be entitled The Fulton Loan and Building Association, and shall have for its object the accumulation of a fund by monthly subscriptions, or savings of the members thereof, to assist them in procuring for themselves such real estate as they may deem proper.

“ARTICLE II.

“Sec. 1. Any white resident of Georgia, twenty-one years of age and upwards, may be a member of this Association. Married females and minors may hold property in this Association by trustee, and not otherwise; and the names of the person or persons for whom such property is held in trust shall be specified on the books of the Association.

“Sec. 2. Each stockholder, for each and every share by him or her held, shall pay the sum of one dollar, in *per funds*, on subscribing, and the same amount on the eighth (8th) day of each and every month thereafter, (unless such day occur on Sunday, in which event the payment to be made on the day previous,) to the treasurer, or to such other person or persons as shall from time to time, by the laws and regulations of the Association, be authorized to receive the same, until the whole stock shall be of sufficient value to divide to each share of stock the sum of \$200.

“Sec. 3. When each stockholder, for each and every share of stock by him or her held, shall have received the sum of \$200, then this Association shall determine and close: *Provided, always*, that any stockholder having received an advance in the manner prescribed in Article eighth, shall be debited in his account with the premium paid thereon.

“Sec. 4. Should any stockholder fail to meet his or her dues as often as the same shall be payable as aforesaid, he or she shall forfeit and pay the additional sum of ten cents on every such failure and for every dollar thus unpaid, the same to be charged with the monthly dues.

“Sec. 5. Should any stockholder neglect or refuse to pay

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his or her monthly dues or fines for more than three months, he or she shall receive from the treasurer the amount of dues actually paid, with no allowance for interest thereon—first deducting all fines and arrearages with his or her proportionate part of any losses and expenses sustained—and thence cease to be a member of this Association.

"Sec. 6. Should any stockholder, not having received an advance, wish to withdraw from the Association, he or she shall be entitled to receive from the treasurer the amount of dues actually paid, first making the deductions provided for in the fifth section of this Article: *Provided, however*, that no stockholder wishing to withdraw give less than one month's notice to the directors of such intention. Transfer of stock may at any time be made in the presence of the treasurer, attested by his signature; but no such transfer shall be valid until all arrearages or fines that may be due upon said stock shall have been duly discharged. Such transfer must be made at least thirty days before an election to entitle the holder thereof to vote.

"Sec. 7. In the event of the death of a member who has not made a loan, the heirs or legal representatives of the deceased may continue his relation to the Association; or should they prefer it, shall be entitled, by giving the treasurer thirty days' notice, to receive from the Association the amount paid in, together with seven per cent. simple interest thereon from date of monthly payments; or should any such deceased member have made a loan and the note given to the Association be for an amount greater than that paid in by him to the Association in addition to seven (7) per cent. simple interest thereon, then the heirs or legal representatives may cancel the said note by paying its full value, less the amount paid in and interest as above stated; but if the note be for a less amount than that paid in and seven (7) per cent. simple interest thereon, then the heirs or legal representatives shall be entitled to receive from the Association the difference. In every instance of withdrawal by death, any arrearage there may be due for fines, arrearages, unpaid premi-

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ums for insurance, and proportion of losses and expenses sustained, shall first be deducted.

"Sec. 8. No stockholder shall hold in his or her own right more than thirty (30) shares.

"Sec. 9. Each stockholder, for each and every share by him or her held, either in their own right or as trustee, shall be entitled, when personally present or by written proxy, at an annual election or special meeting, to one vote, for the election of officers and other purposes: *Provided, however*, that no stockholder shall be entitled to more than twenty votes on any one ballot, and be allowed one ballot only in any one election, or on any one question, for him or herself or as trustee for any other person.

"Sec. 10. Each member, upon subscribing for a share or shares, and making the first monthly payment of the same, shall be entitled to a certificate of such share or shares, specifying the number and amount thereof respectively, signed by the president and countersigned by the treasurer, which certificate shall be evidence of his title thereto.

"Sec. 11. Each stockholder shall sign this Constitution, thereby obligating himself or herself to pay punctually their monthly dues, interest and fines, and to fulfill all other requisitions herein contained.

"Sec. 12. The fines imposed by the fourth section of this Article shall be debited to the defaulting member until all arrears are paid.

"ARTICLE III.

"The officers of this Association shall be a President, Treasurer, Secretary and four Directors, exclusive of the President, (who shall be *ex-officio* a member of the board, all of whom must be stockholders. They shall be elected at the annual meeting of the stockholders on the evening of the eighth day of June, 1866, and on the tenth day of June in each and every year thereafter; provided that day do not occur on Sunday, in which case the election shall be held on the evening of the previous day. A majority of all the votes represented, or present, shall determine an election. Should

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any officer die, or resign in the interim between one election and another, the board of directors shall have power to fill the vacancy.

"ARTICLE IV.

"It shall be the duty of the president to preside at all meetings of the Association and of the board of directors; to preserve order, and to sign all drafts on the treasurer when ordered by the board of directors, and to perform all other duties usually appertaining to his office. He shall have power, with the concurrence of two of the board of directors, to call a special meeting of the Association whenever he may deem it advisable.

"ARTICLE V.

"Sec. 1. It shall be the duty of the treasurer to receive all moneys paid into the Association, and to pay all orders drawn upon him by authority of the board of directors, when signed by the president and countersigned by the secretary, and until the Association is made a body corporate by order of the Superior Court of Fulton county, or by act of the General Assembly of Georgia, all bonds, mortgages, policies of insurance, and other papers, shall be made to the treasurer as trustee for this Association, and upon the acceptance of such order or Act of Incorporation, all such bonds, mortgages, policies of insurance and other papers shall, *ipso facto*, vest in and, if necessary or proper, be assigned by him to said body corporate. Also to receive and hold in trust for the Association, all bonds, mortgages, policies of insurance, and other papers in connection with property upon which money is loaned, first giving his receipt therefor to the Secretary. It shall be his duty, and he is hereby empowered to give release and acquittance for all sums of money paid to the Association upon any note, bond, mortgage or other security, and, if necessary, acknowledge satisfaction of the same on record. He shall keep accurate accounts with the stockholders and of all moneys paid into the Association. His books shall be subject to the inspection of the board of directors, and he shall be prepared, at all times, to inform the members

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of the state of their accounts, and, at the annual meeting furnish a detailed statement of the finances of the Association. He shall give satisfactory bond for the faithful performance of his duties; shall receive such compensation for his services as the board of directors may determine, subject to the approval of the stockholders, and, at the expiration of his term of office, deliver over to his successor all moneys, books and papers in his possession belonging to the Association.

"*Sec. 2.* The treasurer shall deposit with the board of directors a correct duplicate of his receipt book, which he shall keep posted up every month so as to show all the receipts each month; and should the treasurer at any time refuse to exhibit any of the books or papers to any of the board of directors upon application, the board of directors shall dismiss him at once from office, and demand and receive from him all the books, papers and assets in his hands, and elect a successor to fill his unexpired term. Upon such dismissal, a refusal to deliver any of the books or assets of the Association shall be deemed and taken to be a full breach of the treasurer's bond.

"ARTICLE VI.

"It shall be the duty of the secretary to keep correct minutes of the proceedings of this Association, and of the board of directors, and record the same in a book or books provided for that purpose. He shall attest all orders drawn on the treasurer for the payment of money, under the authority of the board of directors. He shall have charge of all books and papers belonging to the Association except such as are entrusted to the treasurer, and deliver up the same in good condition to his successor in office. He shall receive for his services such compensation as may be fixed upon by the board of directors and approved of by the stockholders.

"ARTICLE VII.

"*Sec. 1.* It shall be the duty of one or more of the directors to meet statedly on the eighth evening of each an

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and every month—at such place as the board may appoint—with the stockholders, to dispose of the funds of the Association according to the constitution, and to conduct the business of the Association generally.

“*Sec. 2.* They shall hold, on the fourth day after the monthly meeting, a special meeting, and other meetings as often as may be necessary, for the consideration of securities offered, and shall be empowered to appoint a solicitor for the Association, whose business it shall be to examine all titles, and draw up all papers in connection with said securities and attend to all other legal business of the Association. He shall be paid for his services such salary, out of the funds of the Association, as may be fixed upon by the directors and approved by the stockholders. In no case shall an order be drawn on the Treasurer for an appropriation until the necessary searches in the Courts of record shall have been made, and the solicitor certifies to the satisfactory character of the securities offered.

“*Sec. 3.* A majority of the board of directors shall constitute a quorum. They shall be empowered to fill all vacancies that may occur in their number, and to adopt any regulations for their government not disagreeing with this constitution.

“*Sec. 4.* They shall, from time to time, inspect the books and accounts kept by the treasurer, and shall cause a full statement of affairs of the Association to be annually prepared by that officer at least seven days before the annual meeting of the members, at which meeting such statement shall be submitted after having been first audited and signed by three members of the Association selected by the board.

“*Sec. 5.* Any order on the treasurer must be sanctioned by a majority of the board, and signed by the president and secretary.

“ARTICLE VIII.

“*Sec. 1.* Each stockholder, for each and every share of stock he or she may hold in the Association, shall be entitled to purchase an advance of stock of \$200 and no more; pro-

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vided, however, that no stockholder shall receive an advance of over \$1,000 at any one monthly meeting, if any other stockholder present, not having received an advance, shall bid for it at an equal premium.

"*Sec. 2.* The amount paid into the treasury each month shall, at the monthly meeting of the stockholders, be sold to the highest bidder or bidders among them; provided the same be not sold under forty per cent. premium, and be secured by real estate fully equal in value to the net sum advanced. If there should at any time be no bid for the money as high as forty per cent., then the money shall be distributed by lot among those stockholders entitled to borrow under the rules of this association; and if the person upon whom the lot shall fall, shall fail, or neglect, or be unable to give security required, he shall pay interest on the money, according to the requirements of the constitution, until the next regular monthly meeting, when it shall again be distributed as above described—the name or names of the person or persons in default, as above mentioned, being left out of the lot until all the other members, entitled to an advance, shall have drawn.

"*Sec. 3.* Any stockholder taking an advance shall allow to be deducted the premium offered by him or her for the same and shall secure the Association for such advance by satisfactory bond and mortgage, and policy of insurance, renewed from time to time at his or her expense. He or she shall further pay all recording fees, and all other expenses connected with such security, except the solicitor's fees.

"*Sec. 4.* For each advance of \$200 made to a stockholder one share of stock shall be assigned as collateral security. In case of failure to offer sufficient security for an advance within one month from the date of the purchase, the month's interest shall be charged to said purchaser, and his or her right to said purchase cease.

"*Sec. 5.* Any stockholder taking an advance shall pay the treasurer, in addition to his or her monthly dues on shares, one dollar per month for each share on which an

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advance is made, or at the rate of six per cent. per annum on the whole amount, including the premium.

"Sec. 6. No stockholder shall be entitled to an advance who is in arrears to the Association, and no property taken as security for an advance out of the limits of the county of Fulton, it being understood that the borrower shall pay all necessary expenses incurred by the directors in making an examination of all property out of the city of Atlanta.

"Sec. 7. Should any stockholder, having received any portion of his or her stock in advance, neglect or refuse to pay any or all of his or her dues to the Association for three successive months, then the directors may compel payment of principal and interest by instituting proceedings on the bond and mortgage, according to law. When any sale shall take place of any property mortgaged to the Association, the directors shall have power to retain and apply so much of the purchase money as would be required to redeem the property, pursuant to the provisions contained in the ninth article of this constitution, together with all other payments, moneys and expenses due to the Association, and shall pay the surplus thereof to the mortgagor.

"ARTICLE IX.

"Sec. 1. Should any stockholder, who has executed a mortgage to the Association, be desirous of selling the mortgaged property subject to the mortgage, he or she shall be at liberty to do so, with the consent of the directors, upon first duly transferring the shares secured by said mortgage to the intended purchaser, and upon such transfer being completed, and all arrears due the Association from the mortgagor being paid, and the conveyance to the purchaser being executed, such purchaser shall henceforth be liable to pay all monthly dues and interest payable in respect of such shares, and the directors may grant to the original mortgagor a release from all future liability in respect thereof.

"Sec. 2. It shall be lawful for any stockholder, having executed a mortgage in favor of the Association, to substitute at his or her own expense, and subject to the approval of the di-

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rectors any other property as security to the Association in lieu of that originally mortgaged.

"*Sec. 3.* Should any stockholder desire to have his or her property discharged from mortgage before the Association shall have regularly terminated, he or she shall be allowed so to do by paying into the hands of the treasurer such a sum of money as shall, at the rate of premium the funds are then selling, produce the same monthly payment of interest as that which said stockholder had been previously paying on his or her advance: *Provided*, that such sum shall in no case be less than the net amount actually received by him or her: *And provided further*, that no release shall be given until the money paid for such release shall have been sold, and the security offered for the same be approved by the directors, and the papers connected therewith duly executed; such stockholder paying all costs connected with the redemption of the mortgaged property.

"ARTICLE X.

"In addition to the fines mentibned in the fourth section of the second Article, any officer of the Association, for neglecting to attend any of the annual or special meetings, shall be fined for each and every such neglect, the sum of one dollar; nor shall any fine be remitted in any case other than sickness or absolute necessity.

"ARTICLE XI.

"This constitution can only be altered or amended at an annual meeting, and by a majority of the stock represented or present; and at least one month's notice of the proposed alteration must be publicly given.

"ARTICLE XII.

"The capital stock of this Association shall be not less than two nor more than three thousand shares."

The defendant then introduced the original mortgage and note, and transfer of stock given by plaintiff to defendant, dated 13th September, 1866, for the first sum borrowed by plaintiff of defendant, and, by consent of parties on the

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trial, it was admitted that all the other mortgages and notes and transfers given by plaintiff to defendant, for other sums obtained by plaintiff from defendant, contained precisely similar provisions, and differed from this one only as to dates and amounts. A copy of which mortgage, etc., is as follows:

"THE FULTON LOAN AND BUILDING ASSOCIATION.

"STATE OF GEORGIA—FULTON COUNTY.

"This Indenture, made this 13th day of September, in the year of our Lord, one thousand eight hundred and sixty-six, between Anderson M. Parker, of the first part, and N. R. Fowler, as treasurer, trustee for the members of the Fulton Loan and Building Association, his successors in office and assigns forever, of the second part, being of the county and State aforesaid, witnesseth: That whereas, the said party of the first part has, according to the constitution and by-laws of said Association, procured an advance and borrowed from said Association the full and just sum of \$1,000, and therefore owes to said Association the said sum, with interest at the rate of six per cent. per annum, payable monthly; and whereas, the said party of the first part is desirous to secure unto said Association the true and full payment of said debt and interest as aforesaid, in accordance with said constitution and by-laws of said Association. Now this indenture witnesseth, that the party of the first part, as well for the better securing to the party of the second part the faithful payment of the debt, which the said party of the first part justly owes to the party of the second part, in manner herein mentioned, as in consideration of the sum of five dollars to him in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold, aliened, released and confirmed, and by these presents does grant, bargain, sell, alien, release and confirm unto the said party of the second part as treasurer, as trustee as aforesaid, his successors in office and assigns forever, all that city lot of land in the city of Atlanta, fronting on Broad street twenty-one feet, and running back seventy-five feet, bounded by

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Healey's lot on the south, and by lot belonging to said Parker on the east, leased to B. N. Williford, north by lot belonging to said Parker, and fronting west on Broad street, together with all and singular the edifices, buildings, rights, members, hereditaments and appurtenances to the same belonging, or in any wise appertaining, and all the estate, right, title, interest, property, claim and demand whatsoever, in law or in equity, of the said party of the first part, of, in, or to the same; and the reversion and reversions, remainder and remainders thereof. To have and to hold the said premises hereby granted and released, with the rights, members, hereditaments and appurtenances thereunto, and every part and parcel thereof unto the said party of the second part, his successors in office and assigns forever, to the only proper use and behoof of the said party of the second part, his successors in office and assigns forever; upon condition, nevertheless, that if the said party of the first part, his heirs, executors, administrators or assigns, shall fully and faithfully pay to said party of the second part, his successors in office or assigns \$1,000, according to the tenor and true intent and meaning of his certain promissory note, bearing even date with these presents, and duly made and executed by said party of the first part to the said party of the second part, payable on demand, according to the constitution and by-laws of said Association, with interest at the rate of six per cent. per annum, payable monthly, then this present indenture and the estate hereby granted, and every article and clause herein contained, as well as the said promissory note, shall cease and become utterly void. And it is hereby mutually covenanted and agreed between the parties to these presents, that if default shall be made in the payment of the principal, secured to be paid to the said party of the second part, whenever the same shall be demanded, according to the constitution and by-laws of said Association, and the interest which shall accrue thereupon, at any time or times on which they shall be due, or if any part of such principal or interest, that then and from thenceforth it shall be lawful for the party of the

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second part, his successors in office or assigns, to grant, bargain, sell and dispose of the said hereby granted premises, and all benefit and equity of redemption of the said party of the first part, his heirs, executors, administrators or assigns therein, according to the charter, by-laws, rules and regulations of said Association, rendering the overplus of the purchase moneys to be obtained for the same, after full satisfaction of the principal and interest to be due on such promissory note, in manner aforesaid, and the charges for advertisement and sale, and attorney's fees, cost of Court, and expenses of inclosure, if any there shall be, unto the said party of the first part, his heirs, executors, administrators or assigns; and the said party of the first part agrees to give such additional security for said loan, to the said party of the second part, may be required, according to the constitution and by-laws of said Association; and, the wife of the said party of the first part, hereby releases and relinquishes to the said party of the second part, all her right to dower that she now has or may hereafter have in and to the premises herein described and conveyed.

"In witness whereof, the said party of the first part hath hereunto set his hand and seal, on the day and year first above written. (Signed)

A. M. PARKER, [L. s.]

Signed, sealed and delivered in presence of

(Signed) JOHN T. COOPER,

(Signed) DANIEL PITTMAN, Ordinary.

Witnessed.

(Signed)

N. R. FOWLER, Treasurer.

Recorded September 2d, 1866.

(Signed)

W. R. VENABLE, Clerk."

Defendant introduced the original deed from plaintiff to defendant for the property agreed to be conveyed. It was dated 30th of March, 1868, the consideration therein expressed was \$6,500, and the deed was in the usual form of simple deeds.

Defendant then put in evidence a writing as follows :

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"STATE OF GEORGIA—FULTON COUNTY.

"To Noah R. Fowler, Treasurer of the Fulton Loan and Building Association, and to all whom it may concern:

"This writing will witness that I, A. M. Parker, for and in consideration of full value received, have transferred, assigned and set over to the Fulton Loan and Building Association, all the shares of stock I hold and control in the same, being one hundred shares therein, and the said Noah R. Fowler, treasurer as aforesaid, is hereby authorized and requested to make such transfer, or cancel the same on the books of the company, accordingly.

"Witness my hand and seal this, 30th day of March, 1868. Mortgage on Broad street property to remain solely as collateral security for covenant of warranty deed, this day given.

(Signed.)

A. M. PARKER."

In rebuttal, plaintiff testified as follows:

The matter of usury was not in controversy between plaintiff and defendant, at the time of said settlement in March, 1868, nor before. Nothing was said about usury then, or before, to him, and the matter of usury was not covered by that settlement. He had not demanded any deduction from defendant's claims on the ground of usury. The written proposition was the only one ever made by defendant to him for a settlement, and contains all the matters settled. He did not then know that he had any claim for usury against defendant. He thought the settlement a hard one, but supposed defendant had the advantage of him, and that he could do no better. He had complained of the ambiguity of one article of the constitution, by which a borrower upon settling as he was, met with harder terms than he might anticipate, but yielded to defendant on that point.

His property was worth \$6,500 and more, in cash, at the time he conveyed it to defendant.

The jury returned a verdict for the defendant. Whereupon plaintiff moved for a new trial upon the following grounds, to-wit:

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1st. Because the verdict of the jury is strongly and decidedly against the weight of the evidence and unsupported the evidence.

2d. Because the verdict is contrary to law, equity and justice.

3d. Because the Court erred in refusing to allow plaintiff show his pecuniary condition and monetary necessities at time he obtained the money from defendant.

4th. Because the Court erred in refusing to allow plaintiff's counsel to place in the hands of plaintiff, when on the stand as a witness, the bill of particulars annexed to the declaration for the purpose of enabling plaintiff to refresh memory as to the dates and amounts of the items thereof, if plaintiff had stated he could not, from mere memory, recite the dates and amounts of most of said items.

5th. Because the Court erred in permitting J. R. Wallace to come on the stand as a witness for defendant, over the objection of plaintiff, to testify as to the value of the real estate conveyed by plaintiff to defendant, in pursuance of the settlement of March the 8th, 1868, with the view of showing said real estate to have been worth less than the price agreed upon by the parties at the time.

6th. Because the Court erred in charging the jury "That the papers which have been submitted to you in this case do not show a usurious contract, but the contract, as shown by the papers, is not usurious. Look at all the circumstances and decide if the contract, as shown by the papers, was made in good faith; if so, the transaction is not usurious. If you should find that the contract was not an artifice resorted to for the purpose of concealing the true character of the transaction, then the plaintiff could not recover; but if you believe the contract was an artifice or contrivance designed to conceal the true nature of the transaction, then plaintiff would be entitled to recover the usury paid."

7th. Because the Court erred in charging the jury thus: "That the contract was that plaintiff was to obtain money, and was contemplated that in a certain contingency that might

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arise, Parker might not have to pay more than principal and legal interest, then it is not usury; each took his chance."

8th. Because the Court erred in charging the jury thus: "If there had been transactions between the parties and they met together and, by agreement, plaintiff conveyed real estate to defendant for the purpose of paying defendant's demand, also to obtain, as part purchase money of the land, a further sum of money, which real estate defendant received in satisfaction of defendant's demand, and defendant paid to plaintiff the balance of the estimated value of the land in money, plaintiff could not recover in this action unless before suit commenced defendant had converted said land into money by sale."

9th. Because the Court erred in charging the jury thus: "If the jury find that there was an adjustment between the parties, mortgages and notes given up by defendant, and land conveyed by plaintiff in pursuance of that adjustment, and in that adjustment all the money paid by Parker was taken into consideration directly or indirectly, that ends the matter; whether it was called usury or not makes no difference, such would be an accord and satisfaction."

10th. Because the Court erred in refusing to charge the jury as requested in writing by plaintiff's counsel as follows, to-wit: "The subsequent taking of more than lawful interest is presumptive evidence of an original usurious contract."

11th. Because the Court erred in refusing to charge the jury as requested in writing by plaintiff's counsel as follows, to-wit: "There must be a usurious intention or there is no usury; but if one makes a bargain for more than legal interest, believing that he has a right to make such a bargain or that the law gives him all that he claims, this is a mistake of law and does not save the party from the effect of usury."

12th. Because the Court erred in refusing to charge the jury as requested, in writing, by plaintiff's counsel, as follows, to-wit: "If the jury believe, from the evidence, that plaintiff conveyed to defendant real estate in payment of the demand then held by defendant against plaintiff, and then

real estate was received as payment by defendant, then such payment would have the same effect in this case as if so much money had been paid and received."

13th. Because the Court erred in refusing to charge as requested by plaintiff's counsel, in writing, as follows, to-wit: "That the price of the real estate, so conveyed and received, which the parties placed upon it was binding upon them in this suit."

14th. Because the Court erred in refusing to give to the jury, as requested, in writing, by plaintiff's counsel, the following charge, to-wit: "A settlement does not necessarily amount to a compromise, nor to an accord and satisfaction; there may be a settlement without a compromise, or without accord and satisfaction."

15th. Because the Court erred in refusing to charge the jury as requested, in writing, by the counsel for plaintiff, as follows, to-wit: "To sustain the plea of accord and satisfaction in this case, it must appear from the evidence, to the satisfaction of the jury, that the matter of usury was in controversy between both plaintiff and defendant at the time of settlement, and that the same was taken in and actually settled between the parties, and that, in and by said settlement, some advantage, legal or equitable, enured to plaintiff. If the matter of usury was not, on the part of each party, intentionally settled and adjusted in said settlement, then such settlement is no accord and satisfaction of the plaintiff's claim for usury, sued for in this action."

16th. Because the Court erred in refusing to charge as requested, in writing, by plaintiff's counsel: "That there is no special form or expression necessary to constitute a usurious bargain. If the intention is, substantially, that one should loan his money to another, who shall therefor, in any manner whatever, pay to the lender more than legal interest, it is a case of usury."

17th. Because the Court erred in refusing to charge the jury, as requested, in writing, by plaintiff's counsel: "That if the jury should believe, from the evidence, that the con-

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tract between the parties was usurious, and that the matter of usury was not compromised in any settlement, then plaintiff would be entitled to recover the amount, whatever it is, which the evidence shows plaintiff paid defendant over and above the principal borrowed and legal interest thereon, to time of payment, with interest on said excess from the date of the payment of said excess."

18th. Because the Court erred in refusing to charge the jury as requested, in writing, by plaintiff's counsel: "That if the jury should believe, from the evidence, that, at the time of settlement, defendant's demand exceeded principal and lawful interest, and plaintiff settled with defendant without setting up any objection of usury or claim of usury, such settlement would not bar plaintiff from afterwards suing for and recovering the usury."

19th. Because the Court erred in putting a construction on the contract, and in charging the jury so, when the construction, under the facts of the case, was for the jury to decide, and not for the Court.

The motion for a new trial was overruled by the Court, and plaintiff excepted, and assigns said ruling as error upon each of the aforesaid grounds.

E. N. BROYLES; R. ARNOLD, for plaintiff in error. 1st. The Court erred in excluding the evidence offered by plaintiff, as to his pecuniary condition at the time of the loan: 9th Peters, 443, 453, 454. 2d. The Court erred in refusing to allow the plaintiff to testify from the bill of particulars: 1st Greenleaf's Evi., sec. 436; 24th Ga. R., 513. 3d. The Court erred in charging as set forth in the sixth ground of a new trial: 21st Ga. R., 620; 35th Penn. R., 470; 26th Ind. R., 269; 41st *Id.*, R., 478; 33d Barb. R., 103; 25th Bark. R., 268; 6th Allen R., 116; 2d Cowen R., 705; Par. *Met. Law*, sec. 255; 2d Par. on Notes and Bills, sec. 411; 3d Par. on Con., (5th Ed.) 128; Chit. on Con., 704; Story on Con., sec. 597; 36th Barb. R., 585; 31st N. Y. R., 472. 4th. The charge, as set forth in the seventh ground of new trial,

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as error: 9th Peters' R., 448; Cowper, 770; 3d Par. on on., (5th Ed.,) 139. 5th. The Court erred in charging as explained of in the eighth ground of new trial: 42d Ga. R., 56; 7th Cowen R., 662; 2d Wend. R., 481; 1st Ga. R., 154; h. The Court erred in charging as complained of in the h ground of new trial: 42 Ga. R., 455; Code, sec. 2829; Hill R., 572; 9 Barb. R., 371; 2 Abb. N. Y. Digest, 426, 57; 8 N. Y. Digest, 23; 2 Par. on Con., 688. 7th. The court erred in refusing to charge as set forth in 10th ground 'motion for new trial: 2 Par. on Notes and Bills, 414; 11 . Y. R., 368; 3 Par. on Con., (5th Ed.) 117; 2 Cowen R., 56; Parsons' Mer. Law, 257. 8th. The Court erred in refusing to charge as set forth in the 11th ground of the motion for new trial: 2 Cowen, 705; Parsons' Mer. L., 255; 2 Parsons on N. and B's., 411, 412; 3 Parsons' Cont's, 128, 129; bit. on Cont's, 704, note (n.); Story on Cont's, sec. 597. 9th. Court erred in refusing to charge as shown in 12th ground of the motion for new trial: 42 Ga. R., 455 (2); 7 Cowen, 662; 2 Wend., 481; 1 Kelly, 154, 155. 10th. Court erred in not charging request stated in 14th ground in motion for new trial, to effect that settlement does not necessarily amount to accord and satisfaction, etc.: See authorities to point 7th in this brief. 11th. The Court erred in refusing to charge as requested in 15th ground for new trial, as to accord and satisfaction: R. Code, 2829; 8 N. Y. Dig., 23 (1); Hill, 572; 9 Barb., 371; 2 Abb. N. Y. Dig., 426, 457-8; Bouv. Dic., Accord; 14 Barb., 607; 1 Abb. N. Y. Dig., 138; Bacon Abr., Accord A; 2 Parsons on Cont's, (5th L.) 686, 687; 7 Ga., 434-5. 12th. The Court erred in refusing to charge as requested in 16th ground in motion for new trial: 3 Parsons on Cont's, 107; Parsons' Mer. L., 254, 5; 2 Parsons' Notes and B's., 400; R. Code, 2024. 13th. Court erred in refusing to charge as specified in 17th ground for new trial. 14th. Court erred as stated in 18th ground for new trial: See authorities to point 11th in this brief. 15th. Court erred in putting a construction on the contract in charging the jury so, as the construction was for the

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jury, being a mixed question of law and fact: 9 Wal., 248, 201; 11 Wal., 394, 252; 10 Wal., 129; 12 Wal. R., 391; 21 How. R., 146; 11 Wheaton R., 75. 16th. The requests were legal and pertinent, and it was error in the Court to refuse to charge: 37 Ga. R., 102; *Harrison vs. Hatcher*, decided Feb. 27th, 1872; 17 Ga. R., 204.

HILLYER & BROTHER; A. W. HAMMOND & SON, for defendant. 1st. The pecuniary condition of plaintiff was not relevant: Code, sec. 3703. 2d. Improper to have allowed plaintiff to testify from the bill of particulars: 18 Ga. R., 463; 1 Greenleaf Ev., sec. 431. 3d. The charge of the Court was substantially correct: 43 Ga. R., 529; 41 *Ib.*, 186; 16 *Ib.*, 241. 4th. The construction of the written contract was a question for the Court: Code, sec. 2712; *Blydenburg on Usury*, 85; 1 Wal. R., 625; 12 Fla. R., 552. 5th. Usury, if any, was settled by accord and satisfaction: 21 Ga. R., 592; 52 Barb. R., 581; Code, sec. 2594.

MCCAY, Judge.

Was this contract usurious upon its face? Was the Court, construing the papers as they were presented, without other testimony, wrong in saying that the contract was not usurious in form? We think this contract on its face to be a mere sale by the plaintiff of his right to a share in the ultimate division of the accumulations. That is clearly the *form* of the contract. The plaintiff was the owner of stock or shares; they paid nothing, and were to pay nothing, until the accumulations amounted to a certain sum, when, as is the result of the provision for winding up, that sum was to be divided between such of the shareholders as had not sold. Having such shares, the plaintiff *sold* them to the company, the company advancing him a certain sum of money and he binding himself to do certain other things. That is clearly the *form* of the contract. It is not a loaning of money at all, nor is it forbearance for the use of money, but a sale of certain shares of stock in the company to the company. We do

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at present, mean that beneath this form, apparently legal, may not lurk a device for covering up usury; we only see, upon the face of the contract, it is simply a sale of plaintiff's stock to the company, at such a price as he saw fit to take and the company to give, and that is all. If there be any concealment, it is concealed; the contract does not indicate it. The plaintiff was a subscriber to the stock; he paid in a portion of his assessments, and he agreed to sell his stock, or, rather, to sell out to the company his share in the final dividend.

It must be remembered that the evidence shows *two* contracts: one is the *taking* of the stock and the contract to pay monthly, as stipulated; and the other is the *sale* of it. These were not cotemporaneous; one was complete without the other. The taking of the stock, and the obligations then incurred, were not dependent at all upon the sale. The plaintiff might or might not sell. Doubtless, some of the stockholders will not sell. It is not a part of the stock contract that they shall sell. It is at their option. The contract, as a contract, is a separate, independent thing, complete in itself, and, with all its obligations, is prior to, and in no necessary way has anything to do with the subsequent contract of sale. A stockholder, who had paid ten monthly installments, might certainly have sold to a stranger—one who was not a stockholder—all his interest in the company, contractually at the same time, that he would continue to pay the monthly installments, as they fell due, and, no matter how low the price, or at how great a sacrifice he sold, there would be nothing in the *form* of the contract to show usury. In other words, as the facts in the record show, the plaintiff subscribed for a certain number of shares in the stock of the company. By the terms of that subscription, he was to pay, monthly, on each share, a certain sum until the accumulations should reach a fixed figure, when the assets were to be divided among the stockholders then holding stock. There was no usury or illegality here, but only a simple subscription for stock with the obligation to pay according to the terms of

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the contract. The subscriber becomes the owner of the stock as he would be the owner of any other stock subscribed for. Why may he not sell it as he may other stock, to a stranger or to the company, and contract that the purchaser shall have it, free from any liability to calls or monthly payments? This is the stock contract, and it is a legal, natural contract on its face.

Having made this contract, the stockholder has his option to keep it or to sell it, to hold on for his final division, or to sell for what he may deem its present worth in cash, he contracting to keep the purchaser harmless from the demand for monthly payments. This second contract, this sale, is purely optionary. The stockholder may make it or not, and for this reason this contract of sale has no necessary connection with the subscription. The contract of sale on his part is simply that he will pay \$1,00 per share extra each month, and will comply with his original undertaking. There is absolutely nothing in either of these two contracts, upon *the face of them*, that is usurious, and we see no error in the Court so holding.

Whether the scheme, taken as a whole, is or is not a device to avoid the usury laws, is a question of fact for the jury under the proof. The Court so charged the jury, and the finding is in effect that it was not such a device. We think the jury found rightly under the evidence. As we have shown there is nothing in the form of the contract, nothing on its face, to make it usurious. Was this form a mere trick or device by which to hide or cloak the real intent?

The object of the Association is, as expressed in the articles, to enable the members to acquire, by the payment of small sums monthly, houses and homes. The whole affair is simply this: A certain number of persons agree among themselves that they will each advance, to make up a fund, a certain sum monthly; that each will bind himself to continue to make that monthly advance until the gross value of the whole fund shall amount to a certain agreed sum, when it shall be divided among those who have continued to pay and have not sold out their interest. Having thus secured

a monthly fund and arranged for its continuance, it is further agreed that at each monthly meeting the money on hand shall be employed in buying up the interest of any stockholder who may be willing to sell any of his stock, the seller continuing his regular monthly payments, and paying also, each month, one dollar for each share he has sold. *Whenever* the accumulation on hand—whether derived from regular monthly payments or from profits thus made by the purchase of the stock—reaches a certain per cent., the whole affair winds up. The monthly payments cease, and the money on hand is divided to the stockholders who remain. It must be added, also, that each stockholder, when he sells to the company his ultimate interest, still retains his right to vote and act as a member. Now, as we have said, there is nothing, either in the form or in the nature of the contract of subscription, or in the contract of sale, that is illegal. Both of them occur every day, and were the *sale* of the ultimate interest made to a stranger or to another member of the company, there would be no pretense of usury, however low the price. Can the fact that the sale is made to the company itself make any difference? If there is any difference it is only in this, that the seller is himself interested in the purchase, and continues, as we shall see, to be interested in every sale and purchase until the final winding up of the enterprise. What the stockholder agrees to pay for the money he gets when he takes money, is dependent on what he and others agree to take the money at. So soon as the accumulations reach a certain per centage—that is, will divide \$200 to each stockholder—all payments stop and the concern winds up. If the money at each monthly meeting is in demand and stockholders take it at a high premium, the accumulations increase rapidly and the end comes soon. If the rates are low, the end is a long way off and the monthly payments are continued a long time. If the company gets its accumulation in two years, the monthly payments are \$48 per share. If it takes four years to reach that point, the monthly payments are \$48 per share. Hence, all parties

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are interested in high rates. Even on the rates at which this plaintiff sold out, it is in testimony that if the rates could have been kept up to that figure he would have only had to pay seven per cent. for his money; in other words, the end would have come so soon that his monthly payments would not have been more than the money he actually got and seven per cent.

Even on the idea that he was borrowing the money, and was merely selling his interest in the dividend, it was wholly a matter of contingency whether he paid seven per cent., or more or less than that, for the money. This fact, this uncertainty or contingency, introduces into the transaction an element wholly foreign to an agreement to pay so much for the use of money. It may be that the borrower pays nothing; it may be that he does not really pay the whole of the principal. It may happen that he shall have to pay one, or two, or thirty per cent. It all depends on how soon the end comes; how high the *average* rates are. The contract is not a contract for the loan of money with interest, since the lender (if it is a loan) does not know what he will get back, or rather what the *taker* will eventually pay, since that depends entirely on how long it will take to reach the point of final winding up. The profits to the lender, or loss to the borrower, may be less or more than seven per cent on the amount received.

Treating this sale of the ultimate interest as a borrowing, let us see how it would be under, say, the rate of forty per centum premium. At forty per centum average sales, through the whole period, the concern will come to an end and the payments *stop* in about six years. Suppose one holding five shares, on the first meeting, takes an advance at forty per cent. premium, this would be \$400 on the \$1,000, or five shares. This would leave him \$600 in cash.

His account would stand thus with the company:

Company Cr.

By cash.....\$600 00

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Company Dr.

years' monthly payments of one dollar per share on five shares.....	\$360 00
years' monthly payments of one dollar per share on five shares (interest).....	360 00

Amount paid in all.....	\$760 00
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Now suppose he had borrowed \$600 00 at seven per cent.,
kept it six years and paid it, the account would be:

years' interest on \$600 00, at seven per cent., \$42 00 per year.....	\$252 00
the principal.....	600 00

Amount paid in all.....	\$852 00
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so that in the Association plan, he pays \$108 00 less than
in per cent.

The settled rule is, that if any other element—as risk of
losing the whole or risk of getting less than the legal rate,
part of the contract, it is not usury. Usury is the taking
more than the legal rate for the *forbearance*. If the lender
undertakes any risk, if the contract is of such a character as
that the borrower or taker of the money may not have to pay
principal or may not have to pay as much as the legal
rate, then it is not usury. Now it is apparent—first, that
the great leading idea of this Association was, that it was an
advantage to its members to pay in small sums monthly, with
the right to anticipate their ultimate interest by selling that
for its present worth at auction; and, second, that *bona*
fide and truthfully, it depended entirely upon the
high price the ultimate interests sold at, what rate each
member was paying for his money. If the average price
was high, the end would soon come when the payments
would stop; if low, it would take a longer time, and the rate
would be low or high accordingly. Each pur-
chaser had an interest in the profits—in the price of all the
interests, as that price was on the average, high or low, so
that his monthly payments continue long or end quickly.

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In such a scheme as this, the great element of usury is wanting, to-wit: oppression—advantage taken by one of the necessities of another. The person getting the money in this case, being, in fact, interested himself in having the sales as high as possible. To permit the usurer himself to set up the usury, after the contract has been executed, would be contrary to all principle. The person wronged is allowed so to do, but not the wrong doer, and if the plaintiff here recovers he will recover a part of the advantage which came to himself, from the high rates at which *others* sold their interest in the ultimate dividend. We can easily see how a society of this kind might be used by schemers, to get money for themselves. But there is not a particle of proof that this was the case here. All seems to have been carried on according to the professed object, to-wit: to enable individuals under an agreement to pay small monthly payments, to sell out for a present respectable sum, the ultimate share of each, in the final accumulation. And we think the jury did rightly in finding there was no proof that this scheme was a mere device to evade the usury laws.

Assuming, therefore, that in the taking and in the sale of the stock in the contract the parties made, there was no violation of the law, it only remains to inquire, if in the settlement made there was usury. The plaintiff admits that if he had *complied* with his *contract*, there would have been none. Has he done anything more than this? It was distinctly agreed from the first that any stockholder who failed to comply with the rules, should be subject to certain penalties or forfeitures. Nothing more was exacted in the settlement than the rules required. Indeed, the settlement was more liberal than was provided by the regulations in case of failure.

We do not think the charge of the Judge, on the question of accord and satisfaction, was proper. We agree that if there be a dispute, *bona fide*, as to whether or not any particular contract is tainted with usury, that the parties may by accord and satisfaction, settle that dispute; but the pay

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ment of the usury is not such a settlement. It must appear that there was a *bona fide* dispute—uncertainty, doubt as to the existence of the usury—that the parties must have that doubt, dispute, distinctly in view in the settlement, and the resolution of the doubt must be a point of the settlement. We do not think there is any proof here to justify the inference of such a settlement, and we think the charge does not submit the law fairly to the jury under the proof. But, as we are satisfied that the contract was not usurious—as the jury must, under the law, have found there was no proof of usury—we will not reverse the judgment for this error.

Judgment affirmed.

Z. T. WRIGHT, plaintiff in error, vs. WILLIAM R. PHILLIPS,
defendant in error.

1. Where the affidavit to foreclose a lien on a steam saw mill, under the Act of 1868, alleges that deponent was employed by Wall, the owner or lessee of a steam saw mill situated in the county of DeKalb, as a laborer in and about said mill, for which services there is due deponent \$51 50; that he has demanded payment of said Wall, and he has failed and refused to pay the same; that this prosecution is within one year from the time the debt became due, as will more fully appear by reference to the bill of particulars hereto annexed; that deponent claims a lien upon said mill for the amount so due him as aforesaid, it is in substance a compliance with the provisions of the Act under which plaintiff was proceeding. (R.)
2. The Courts are bound to take judicial cognizance of the fact that the county of DeKalb is located within the State of Georgia. (R.)
3. Where the bill of particulars attached to the affidavit consisted of a due bill for the amount claimed, made by Wall, it was competent for plaintiff to show that it was given for the services specified in the affidavit, that Wall was in possession of the mill at the time of the foreclosure of the lien, and of the levy of the execution thereon. (R.)

Lien on saw mill. Affidavit. Evidence. Before Judge
LOPKINS. DeKalb Superior Court. March Term, 1872.

For the facts of this case, see the decision.

Wright vs. Phillips.

L. J. WINN, for plaintiff in error.

HILL & CANDLER, for defendant.

WARNER, Chief Justice.

This case came before the Court below in the form of a claim case. The plaintiff had proceeded to foreclose a lien on a steam saw mill, under the provisions of the Act of 1868, for services performed as a laborer in and about said steam saw mill; an execution was issued and levied on the same as the property of Walls, the alleged owner or lessee of said mill, which was claimed by Phillips. On the trial, the plaintiff offered in evidence the affidavit, execution and levy on the mill, as set forth in the record. The plaintiff alleged, in his affidavit, that he was employed by one Walls, the owner or lessee of a steam saw mill, situate in said county, (DeKalb,) as a laborer in and about said steam saw mill, for which services this deponent is due the sum of \$51 50, with interest from the 1st January, 1870; that deponent has demanded payment of the said Wall, and that he has failed and refused to pay the same; that this prosecution is within one year from the time the debt became due, as will more fully appear by reference to the bill of particulars hereto annexed; that deponent claims a lien upon said steam saw mill for the amount so due him as aforesaid. The bill of particulars annexed and referred to in the affidavit, is as follows:

"Due Z. T. Wright, for work done at saw mill, fifty-one dollars and fifty cents. This January 1st, 1870.

"ROBERT J. WALL."

The plaintiff offered to prove that the prosecution of the lien against the saw mill was within one year after he rendered the services for which the due bill aforesaid was given by Wall to him, and, also, that Wall was in possession of the mill at the time of the foreclosure of the lien, and at the time the sheriff levied the *fi. fa.* issued thereon. On motion of claimant's counsel, the Court dismissed all the proceedings

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had been taken in the case by the plaintiff, and re-
the evidence offered by him as aforesaid, to which the
ff excepted.

ough the affidavit is written in an awkward manner,
our judgment, it is, in substance, a compliance with
uirements of the Act of 1868. The affidavit alleges
ie steam saw mill is situate in the county of DeKalb,
the Courts are bound to recognize as being in the State
orgia. The affidavit also alleges that payment for the
s was demanded of Wall and refused, and that this
ution is in one year from the time the debt became due,
was competent for the plaintiff to prove that the due
is given for those services, or in liquidation thereof, and
Wall was in possession of the mill at the time the lien
reclosed, and at the time of the levy of the *fi. fa.*
n.

the judgment of the Court below be reversed.

WALLACE, master of the brig Alpharetta, plaintiff in
or, vs. THE STATE OF GEORGIA, for the use of the
nmissioners of Pilotage of Brunswick, defendant in
or.

Sections 1543 and 1544 of the Revised Code prescribing the punish-
ment of any master of a vessel who shall throw, or permit to be thrown
from any vessel any stone, gravel or other ballast, into the waters of
bay or harbor in this State, make such an act an offense against
laws of the State, and the guilty party is to be tried and punished
for other misdemeanors.

Attachment provided for by section 1544, is only to secure and re-
late the fine to be imposed upon the conviction of the offender, and
not to be carried to judgment until after the guilty person has been
convicted and sentence passed, when judgment may be taken on the at-
tachment for the amount of the fine affixed by the Judge.

Penalty. Attachment. Before Judge SESSIONS.
Superior Court. November Term, 1872.

Wallace vs. The State of Georgia.

Hamilton A. Kenrich, as chairman of the Commissioners of Pilotage for the harbor of Brunswick, made affidavit "that J. L. Wallace, the master of the brig Alpharetta, did, on September 13th, 1870, throw, or permit to be thrown, from on board the said brig Alpharetta, into the waters of the bay or harbor of the port of Brunswick a quantity of gravel or other ballast." Bond and security was given by said Kenrich in the sum of \$4,000, as was usual in cases of attachment. Whereupon the following attachment was issued, to-wit:

"GEORGIA—GLYNN COUNTY:

"To all and singular the Sheriffs and Constables of said State: You are hereby commanded to attach and seize the brig Alpharetta, now in the port of Brunswick, and that you make return of this attachment, with your actings and doings entered thereon, to the Fall Term of the Superior Court of said county, to which Court this attachment is hereby made returnable. Herein fail not.

." Witness my hand and seal this the fifteenth day of September, 1870.

"A. G. OSGOOD, Notary Public."

The attachment was levied and returned as directed.

The case was submitted to a jury, who found the defendant "guilty." Evidence to sustain the facts stated in the affidavit, upon which these proceedings were based, was introduced, but unnecessary here to be set forth.

The defendant moved for a new trial upon the following grounds, to-wit:

1st. Because the verdict is contrary to the law and the evidence.

2d. Because the Court erred in its ruling, in holding the suit properly brought in the name of Hamilton A. Kenrich.

The motion was overruled and a new trial refused.

The defendant moved that the judgment of the Court be arrested upon the following grounds, to-wit: 1st. Because

the attachment was not sued out in the name of the State of Georgia, as required by law. 2d. Because the verdict was a nullity, the Superior Court of Glynn county not having jurisdiction in the premises, the same having been conferred upon and being confined to the city of Brunswick.

The motion in arrest was overruled by the Court, and judgment entered against the defendant for \$500, in the nature of a penalty.

The defendant excepts to the aforesaid rulings of the Court and assigns the same as error.

HARRIS & WILLIAMS, represented by S. B. SPENCE, for plaintiff in error.

S. C. DEBROHL; S. D. McCONNELL, for defendant.

McCAY, Judge.

We have examined closely and considered carefully the two sections of the Code upon which this proceeding is founded, and, whilst there is some uncertainty as to the true meaning, we are yet satisfied that the proceedings disclosed by this record cannot be sustained. See the Code, sections 1543, 1544. There is not a particle of evidence in the record as to who was the master of this vessel, and there is, in the record, the singular verdict of a jury, in an *attachment* case, that the defendant is guilty, whilst the amount of the finding is fixed by the Judge. It may also be remarked that, though the jury has found the defendant guilty, there is not a particle of evidence that he ever was an officer of, or had control of the offending ship, or, indeed, ever saw it, or the city of Brunswick.

We think, taking both these sections of the Code together, that the throwing of stones, gravel, ballast, and the like, into the harbor of Brunswick is a crime, a violation of the laws of the State, and that the master of a ship who does it or permits it to be done, has committed a crime. That he is to be tried as for a misdemeanor, and if found guilty, he is to be punished

at the discretion of the Court, with a fine of not less than five hundred nor more than two thousand dollars, and may be imprisoned not exceeding three months, at the discretion of the Court.

The proceeding by attachment is only auxiliary to the other. Attachment may issue, the vessel be seized and held until the conviction, when it, the attachment, may go to a judgment for the amount of the fine as assessed by the Judge on the conviction of the offender. The sections, as we have said, are awkwardly drawn, but this is the meaning of them, as we understand the language used. There was, in our judgment, evidence sufficient proven to convict somebody, but who that somebody was, we do not know; we are not even informed by the proof who had control of the ship. But, in any event, we think this judgment wrong, for the reasons given.

Judgment reversed.

JOHN CLARK *et al.* plaintiffs in error, vs. MARTHA A. LYON *et al.*, defendants in error.

1. Where a deed is executed, and a bond taken by the grantor from the grantee, conditioned to reconvey on the repayment of money borrowed, with the interest due thereon at the time stipulated, the two instruments constitute a mortgage, and according to the well established principles of equity, the grantor is entitled to redeem the land on the payment of what may be due. (R.)
2. This being a Confederate contract, the amount to be repaid must be determined under the provisions of the Ordinance of 1865. (R.)

Equitable mortgage. Tender. Scaling Ordinance. Injunction. Before Judge GREENE. Henry Superior Court. April Term, 1872.

For the facts of this case, see the decision.

S. C. McDANIEL; J. J. FLOYD, for plaintiffs in error.

Clark et al. vs. Lyon et al.

DOYAL & NUNNALLY; SPEER & STEWART, for defendants.

WARNER, Chief Justice.

This was a bill filed by the heirs-at-law of Thomas J. Lyon, against John Clark *et al.*, praying for relief and injunction to restrain the sale of a tract of land in Henry county. To this bill the defendants filed a demurrer, for want of equity, which demurrer was overruled by the Court, and the defendants excepted. In our judgment, the demurrer was properly overruled. It appears from the allegations in the complainant's bill, that Thomas J. Lyon, in his lifetime, to-wit: on the 16th day of December, 1862, borrowed from Clark \$3,800 in Confederate money, to pay the balance due for a tract of land purchased by Lyons at the administrator's sale of his father's estate; that to secure the loan of the money by Clark to Lyons, and the repayment of the same, Lyons executed a deed to Clark for the tract of land described in the bill, and Clark, at the same time, executed to Lyons his bond conditioned to make him a title to the land, if Lyons should well and truly pay to Clark the said \$3,800, with ten per cent. interest, annually, by the 16th day of December, 1867; and if the said Lyons punctually pay the said money, then the said Clark is to make titles to said lot of land; if not, the said bond to be null and void. The deed was executed by Lyons to Clark to secure the repayment of the money borrowed by Lyons from Clark, and the bond was conditioned to reconvey the land by Clark, when the money so borrowed should be repaid with the stipulated interest, at the time specified.

According to the well established principles of equity jurisprudence, the deed conveying the land to Clark, and his bond conditioned to reconvey the same on the repayment of the money borrowed, with the interest due thereon, at the time stipulated, constituted a mortgage to secure the payment of the money borrowed by Lyons from Clark, and the complain-

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ants are entitled to redeem the land on the payment of what may equitably be found to be due on the final hearing of the cause, under the provisions of the Ordinance of 1865, this being a Confederate contract.

Assuming all the allegations in the complainant's bill to be true, as the demurrer does, it presents a pretty strong case for the interference of a Court of equity.

Let the judgment of the Court below, overruling the demurrer, be affirmed.

GEORGE F. HAWKS, plaintiff in error, vs. WARREN & THOMAS D. HAWKS, defendants in error.

When A sold land to B, taking his note for the purchase-money, secured by a mortgage on the land, which was duly recorded, and B sold a portion of the land to C, who paid a part of his purchase-money to B, and for the balance joined with B in a note to A, secured by a mortgage to A on the lands of both B and C, A giving up the old note and mortgage:

Held, That on the foreclosure of the mortgage, the *fi. fa.* may sell the land of C, notwithstanding C may have had the same set off as his homestead. Whether the purchase-money debt of C to B was satisfied by novation is not material. The note and mortgage given by C to A was for the removal of an encumbrance from the land, and brought the land within the exceptions to the homestead clause of the Constitution of 1868.

Homestead. Encumbrance. Novation. Tried before Judge ANDREWS. Oglethorpe Superior Court. October Term, 1870.

On the 17th day of September, 1869, a mortgage *fi. fa.* issued on May 8th, 1870, based upon a mortgage executed by Henry Hawks and George F. Hawks on February 15th, 1867, in favor of Warren Hawks and Thomas D. Hawks, was levied upon the land described in said mortgage.

George F. Hawks filed an affidavit of illegality, upon the ground that two hundred and ninety-four and a half acres of said land levied on, together with other land belonging to

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him, making in all four hundred and eighteen acres, was set apart to him as a homestead on May 22d, 1869.

It appeared from the evidence that the plaintiffs in *fi. fa.*, as administrators, on the first Tuesday in January, 1866, sold one thousand acres of land to the defendant, Henry Hawks, and one James Smith, who gave their joint note, with mortgage, in payment of the balance of the purchase-money, at the same time receiving a deed to the property. That on February 15th, 1867, Smith and said Henry Hawks divided the land, the former taking four hundred acres, paying in full for his share, the latter taking six hundred acres. That Henry Hawks sold to the defendant, George F. Hawks, two hundred and ninety-four and a half acres, the land in dispute, and executed to him a deed; that on the same day, to-wit, February 15th, 1867, the note and mortgage aforesaid were delivered up, and a note and mortgage given by the defendants on the whole six hundred acres. That George F. Hawks never gave Henry Hawks any note for said land, and received no other consideration for his undertaking in the last note mentioned except the two hundred and ninety-four and a half acres of land aforesaid; that said two hundred and ninety-four and a half acres of land was set apart to George F. Hawks as a homestead on May 22d, 1869.

The jury found the two hundred and ninety-four and a half acres aforesaid not subject to the execution.

Plaintiff in *fi. fa.* moved for a new trial upon the following grounds, to-wit:

1st. Because the Court refused to charge the jury "that if they believed that the consideration for which George F. Hawks signed the note upon which the *fi. fa.* levied is based, is the purchase-money of the land levied on and set apart as a homestead for the said George, that they must find the land subject to the said *fi. fa.*; that if they believed that the land which has been set apart as a homestead for George F. Hawks was the consideration for which George F. Hawks signed the note upon which the *fi. fa.* levied is based, they must find the land levied on subject to said *fi. fa.*"

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2d. Because when plaintiffs in *fi. fa.* requested the Court to charge "that any one holding a debt for the purchase-money of land, whether the land of the holder or of any one else, can enforce the claim against the land," the Court charged the jury "that any person having legally the control of the debt due Henry Hawks by George F. Hawks, could enforce it against the land bought by George of Henry; but this *fi. fa.* is levied on six hundred and twenty-two acres of land, and George bought of Henry less than three hundred acres. In this there has been no transfer of a debt of Henry against George to any other person."

3d. Because the Court erred in the following charge to the jury: "that the consideration of the note upon which the *fi. fa.* levied is founded was the extinguishment of the note given by Henry Hawks and James Smith to the plaintiffs, as administrators."

4th. Because the verdict is contrary to law and the evidence.

The Court sustained the motion and ordered a new trial. The defendant excepted and assigns said ruling as error.

J. D. MATHEWS, for plaintiff in error. The doctrine of novation is conclusive in this case: 1st Pars. on Con., 187 *seq.*; 40th Ga. R., 423; *Ib.*, 193, 487.

W G. JOHNSON; JOHN C. REID; H. Y. MORTON; E. C. SHACKLEFORD, for defendants. 1st. The decision of the Court below granting a new trial was correct, because the consideration for which George F. Hawks signed the note upon which the judgment and *fi. fa.* were rendered, was the land levied upon and now claimed as a homestead by said George F. Hawks. The land is, therefore, subject to the payment of said *fi. fa.*: Constitution of Georgia of 1868, article *Homestead*; 22d Howard, 327; 19th Ga. R., 556; 40th Ga. R., 486; Revised Code, secs. 3031 and 2816; 39th Ga. R., 366; 5th Ga. R., 356; 23d Ga. R., 479; 7th Ga. R., 67, 68; 10th Peters, 641 to 646; 4th Kent's Coms., 152, 153. 2d. The

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note sued on was not a novation: See 9th Ga. R., 240, 12th head note; see, especially, *Lott vs. Dysart* and *Vincent*, decided by the Supreme Court of Georgia the 9th day of May, 1872, from Bartow county; see, also, 16th Ga. R., 190, 1st head note, under which Warren and Thomas D. Hawks could have sued the note of George F. Hawks in their representative or individual character. 3d. This debt of George F. Hawks is a resulting trust, for the benefit of Warren and Thomas D. Hawks: See Hill on Trustees, pages 212, 213, 239, 240, 247, 259, 264; see, also, 2d Story's Eq. Jurisprudence, §§. 1258, 1259, 1196 to 1233, 1040, 1941, 973, 789, 790, 11, 1212, 1218, 1219. 4th. Was not the note sued on given to remove an encumbrance on the land made by the first note? If so, the land is liable to the *fi. fa.*: See 39th Ga. R., 466. 5th. Change of notes is no waiver of purchase-money: See 3d Ga. R., 238; *Ib.*, 341, 342 and 3d head note on pages 42 and 343.

McCAY, Judge.

We do not care to go into the question so elaborately argued at the hearing in this case, to-wit: whether the note given by the two Hawks to the administrator was a novation of the purchase-money contracts, as it is clear to us that the land is subject to the mortgage *fi. fa.* for another reason, even although the novation were complete. One of the exceptions in the homestead law is, it is true, where the debt on which the judgment is founded is a debt contracted for the purchase-money of the land; but another exception is where the judgment is founded on a debt contracted for the removal of an encumbrance from or upon the land. This judgment is founded upon a note, secured by mortgage, the object and consideration of which was to take up and relieve the land from a mortgage or encumbrance existing upon it at the time George Hawks bought it from his brother, to-wit: the mortgage made by the purchasers at the administrator's sale.

We decided, in the case of *Stephens vs. Kelly*, 39 Georgia,

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466, that a debt contracted to take up an execution existing as a lien superior at *the time* to the homestead was a debt contracted for the removal of an encumbrance, and that the homestead from which the encumbrance was removed was subject to it. This is a stronger case than that. George Hawks, when he bought this land, knew there was a mortgage upon it—an encumbrance that would defeat his homestead until it was removed. He joins in a new mortgage with his brother for the special purpose of removing it. Clearly, as it seems to us, this is within the very letter and spirit of the exception. The intent was to put it in the power of the owner of the land, either before or after the homestead was laid off, to change an encumbrance of one kind to an encumbrance of another, or to change the party to whom the encumbrance belonged.

It is said that the exception was put in to aid the operations of Loan and Building Associations, so that men of limited income might become members of such associations, borrow money and take up encumbrances that might exist on their property. The principle is the same in this case as in the cases of such borrowings. George Hawks preferred to give the present mortgage and remove the other. The other was a clear encumbrance, superior to his or his family's claim to a homestead. It is within the very letter, as well as the spirit, of the exception.

Judgment affirmed.

TIMOTHY D. LYNES, plaintiff in error, *vs.* THE STATE OF GEORGIA, defendant in error.

1. Under the provisions of the Constitution of 1868, commissioned Notaries Public are clothed with judicial powers, they are *ex officio* Justices of the Peace, and are embraced within the 4482d section of the Code, which provides for the indictment and punishment of Justices of the Peace for malpractice in office. (R.)
2. In cases of misdemeanors, the joinder of several offenses in the in

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dictment will not, in general, vitiate the proceedings at any stage of the prosecution. (R.)

Where the defendant is charged with three distinct acts of malpractice, a three distinct counts, all being of the same grade of misdemeanor, and the jury returned a verdict of not guilty on the first count, but guilty on the second and third, the verdict was a general one. (R.)

The evidence of the absent witness being inadmissible or immaterial he continuance was properly refused. (R.)

This Court reluctantly interferes with the discretion of the Court below in granting or refusing a continuance, and, in this case, there was no abuse of that discretion which will authorize this Court to control it. (R.)

The defendant having been furnished with a copy of the indictment before it was sent before the grand jury, it was not error in the Court to refuse to direct him to be furnished with a second copy. (R.)

Newly discovered evidence of a custom, in violation of the public laws of the State, is no ground of new trial. (R.)

Criminal law. Malpractice. Continuance. Indictment. Practice. Custom. Newly discovered evidence. Pleading. Number of counts. Verdict. Before Judge HOPKINS. Fulton Superior Court. October Term, 1871.

For the facts of this case, see the decision.

GARTRELL & STEPHENS; FARROW & THOMAS, for plaintiff in error.

JOHN T. GLENN, Solicitor General, for the State.

WARNER, Chief Justice.

The defendant was indicted for malpractice in office as a Notary Public and *ex-officio* Justice of the Peace. On the trial of the case the defendant was found guilty. After the trial a motion was made in arrest of judgment on the following grounds: First, because the 4432d section of the Code is not applicable to Notaries Public and *ex-officio* Justices of the Peace; such officers not being embraced within the words or intentment of said section. Second, because the indictment contains three counts, alleging three separate distinct offenses, committed in three separate and distinct

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transactions, at three separate and distinct times, and with three separate and distinct parties. Third, because the verdict of the jury was a special verdict of guilty, and not a general verdict of guilty, or not guilty. The Court overruled the motion in arrest of judgment, and the defendant excepted. The defendant then made a motion for a new trial on the several grounds set forth in the record, which was overruled by the Court, and the defendant excepted. There was no error in overruling the motion in arrest of judgment on either of the grounds taken therefor. Under the provisions of the Constitution of 1868, commissioned Notaries Public are clothed with judicial powers; they are *ex-officio* Justices of the Peace, and something more, and are embraced within the 4432d section of the Code, which provides for the indictment and punishment of Justices of the Peace for malpractice in office. The offense of malpractice in office is a misdemeanor, and not a felony. In the case of misdemeanors, the joinder of several offenses in the indictment will not in general vitiate at any stage of the prosecution. For, in offenses inferior to felony, the practice of quashing the indictment, or calling upon the prosecutor to elect on which charge he will proceed, does not exist; but on the contrary, it is the constant practice to receive evidence of several libels and assaults upon the same indictment. It was, indeed, formerly held, that assaults on more than one individual could not be joined in the same proceeding; but this is now exploded: 1 Chitty's Criminal Law, 254. A felony and a misdemeanor cannot be joined in the same indictment: *Ibid*. The defendant in this indictment is charged with three distinct acts of malpractice in office, in three separate and distinct counts, but all being of the same grade of misdemeanors. The jury found the defendant not guilty on the first count in the indictment, but found him guilty on the second and third counts contained therein. The verdict was a general verdict on each count in the indictment, in accordance with the provisions of the 4552d section of the Code.

One of the grounds contained in the motion for a new trial

at the Court refused to continue the case on the showing therefor on account of the absence of the witness Sheridan. The defendant was charged in the indictment with returning a warrant and recognizance issued and taken from him, in his official capacity, to the Superior Court, and he knowingly, willfully and corruptly suppressed the same for the consideration of five dollars paid to him. The defendant proposed to prove, by the absent witness, Sheridan, that he was the constable of his Court at the time of the alleged offense, that the prosecutor went out of the county and conferred with the witness to settle the case with the defendant and that the case was so settled at the instance of the prosecutor. In the first place, Sheridan was not a competent witness to testify as to what the prosecutor told him; the prosecutor himself would have been the best witness to prove what he said and did in relation to the prosecution of the defendant, who was arrested and bound over to appear at the Superior Court, even if the prosecutor had the legal power and authority to direct the prosecution to be settled, which he had not; and if the evidence had been received, it would have been any justification or defense of the defendant, who was charged with suppressing the papers for a consideration, in plain violation of his duty as an upright magistrate. It is not that the case was *settled by the prosecutor*. Besides, the Court reluctantly interferes with the sound discretion of the Court below in granting or refusing a continuance, and in this case there was no abuse of that discretion which will authorize this Court to control it.

There was no error in the refusal of the Court to furnish the defendant with a second copy of the bill of indictment, having been furnished with one copy before it was sent to the grand jury; the Court did furnish him with a list of the witnesses who testified before the grand jury.

There was no error in overruling the motion for a new trial on the ground of the admission of Werner's testimony, which does not appear to have been objected to at the time, when he saw a mark made on the papers "canceled," and de-

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fendant wrote over it, "the bond paid." The witness testified as to the act of the defendant when he paid him the money. There is quite sufficient evidence in the record to sustain the verdict of the jury, and that verdict is not contrary either to the law or the evidence.

As to the newly discovered evidence in relation to the custom and practice of other Justices of the Peace in Atlanta, to allow parties charged with misdemeanors, after bond had been given for their appearance to the Superior Court, to come before them and be tried or discharged, or *otherwise disposed of*, all we have to say is, that if such a custom or practice ever existed, it was in violation of the public law of the State, and will be much more honored in the *broad* than in the observance of it. But it is not pretended that this newly discovered evidence will go to show that it was the custom or practice of the Justices of the Peace to receive a pecuniary consideration from defendants who were prosecuted to suppress the warrants and bonds, and not return the same to the Superior Court. In the view which we take of this case we are of the opinion that the judgment of the Court below should be affirmed, and, speaking for myself alone, I have rarely ever seen so many technical objections to a righteous judgment with so little merit in them.

Let the judgment of the Court below be affirmed.

WILLIAM WILLIAMS, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

When, on the trial of an indictment for "burglary in the night time," the jury, after retiring, returned into Court and asked if they could find the defendant guilty of any other offense than that charged in the bill of indictment, and the Court informed them "that they could not," that they must find him guilty or not guilty of burglary in the night time," and the jury found the defendant "guilty:"

Held, That this instruction of the Court to the jury was not such as a prisoner could complain of, and the evidence being such as to justify the verdict, a new trial ought not to be granted.

ninal law. Burglary in the night time. Before Judge
NS. Fulton Superior Court. April Term, 1872.

iam Williams was tried for the offense of burglary
night time. The charge contained in the indictment
as follows: "For that the said William Wil-
n the county aforesaid, on December 8th, 1871, about
r of seven o'clock, in the night time of the same day,
roe and arms, the store-house of one James Zachry,
tuate, where valuable goods, wares and merchandise,
silk dresses, gloves and money were contained and
feloniously and burglariously did break and enter
tent, the goods and chattels of said James Zachry, in
re-house then and there being, then and there feloni-
id burglariously to steal, take and carry away." The
nt pleaded not guilty. The jury returned a verdict
y, and recommended the defendant to the mercy of
irt.

defendant moved for a new trial upon the following,
other grounds, to-wit:

Because the Court erred in failing to instruct the jury
they believed, from the evidence, that the defendant
guilty of the offense charged in the indictment, they
ind for a lesser offense, to-wit: an attempt to commit
ary, burglary in the day time, or an attempt to com-
rceny from the house, provided they believed the evi-
ould justify a verdict of either of the last mentioned

because the Court erred, when the jury came out of
om and inquired whether they could find the defend-
ty of any other offense than that charged in the in-
ent, in instructing them that they must find him
f burglary in the night time, or not guilty, and in
o instruct them that they might find for a lesser of-
-wit: an attempt to commit a burglary, burglary in
time, or an attempt to commit a larceny from the

house, provided they believed the evidence would justify a verdict for either of the last mentioned offenses.

The motion for a new trial was overruled by the Court and defendant excepted and assigns said ruling as error.

RICHARD S. JEFFERIES, for plaintiff in error. Jury may find for less offense than that charged: 1 Ga. R., 222; Code, sec. 4581; 1 Hay. R., 12; 3 Har. R., 554; 22 Pick. R., 1; 14 Vt. R., 353; 11 N. H. R., 269; *Ibid.*, 37. Burglary includes larceny from the house: Code, secs. 4320, 4347. Different grades charged in same count: 1 Bish. on Crim. Law, 539; 12 Ga. R., 293; 1 Bish. Crim. Law., 520; Code, sec. 4615; 10 Ga. R., 422; 9 Carr. and Pa. R., 215. Punishment prescribed for attempts to commit crime: Code, sec. 4615, 4349. Assault "with attempt" and assault "with intent," the same: 14 Ga. R., 55. Offense can be understood from indictment, sufficient: 11 Ga. R., 52; *Ibid.*, 467; 17 Ga. R., 290. If the charge was wrong, defendant was injured: 30 Ga. R., 133. Circumstances must exclude every other hypothesis but that of guilt: 1 Starkie on Ev., 576; 1 Greenleaf on Ev., sec. 13; 3 *Ibid.*, sec. 29.

J. T. GLENN, Solicitor General, for the State. Burglary in the night time does not include burglary in the day time: 26 Ga. R., 396.

McCAY, Judge.

It is contended that the direction of the Court to the jury was wrong, for several reasons. 1st. It is said that the jury may always find the attempt instead of the act. And this is true if the evidence justifies it. But the evidence here is that the crime of burglary, to-wit, breaking and entering with intent to steal, is complete. At any rate it is not required that one shall *steal* to make burglary. So that here was an attempt to commit burglary. 2d. It is said the jury might, under the indictment, have found a verdict of guilty of burglary in the day time. The mistake here is, that it is

that burglary in the day time is included in burglary night time. It is only where the lesser offense is *in* the greater that a verdict can be for the lesser under ctment for the greater; as assault and battery in murtault, in assault and battery, etc. Burglary in the does not *include* burglary in the day time. One may ty of the latter and not of the former, and of the and not of the latter.

said again that the jury might have found the defend- lity of larceny from the house. This is very plausi- arceny from the house may be, in this State, breaking with intent to steal, or entering a house with intent , and it is very true that burglary, to-wit, breaking ering with intent to steal, does, in the very nature of include breaking with intent to steal, or entering with o steal. But there is an ingredient in larceny from se that does not exist in burglary. In burglary, if ak and enter with intent to steal, he is guilty of the

But he is not guilty of larceny from the house if, aking or entering with intent to steal, he, of his *own change that intent*. To make out the crime of larceny e house, when there is no theft or taking, there must aking or entering with intent to steal, and the of- must be *prevented by detection*: Code, section 4347, d with 4349 and 4350. The crime of *actual* "lar- m the house" is imputed, because it exists *in intent*, y does not exist in fact because of its having been ed by another. But burglary, to-wit, breaking and ; with intent to steal, is complete as soon as the break- entering is complete, with the intent to steal. No of after repentance will help it.

e jury in this case were satisfied that the prisoner id entered with intent to steal, he was guilty; and if ought he had *only* entered with intent to steal, he guilty. It is true, the proof shows that he was de- nd prevented, and it may be that this made him, *in* ility of larceny from the house, if he did not break in.

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Still, under this indictment, the jury could not find him guilty of larceny from the house, because the *indictment does not charge him to have been detected and prevented*. We see, therefore, no reason to find fault with the direction of the Court to the jury.

As to the verdict, there is plenty of evidence to sustain it. The window is proven pretty clearly to have been down. There is, at any rate, sufficient proof of it to save the verdict from being illegal, as contrary to the evidence, and we affirm the judgment. It may be added, also, that the prisoner, even on the hypothesis that if he was not guilty of burglary might have been found guilty of something else, got a better charge than he was entitled to and has no reason to complain, since the Judge told the jury that if he was not guilty of burglary he was to be found not guilty generally.

Judgment affirmed.

WARNER, Chief Justice, concurring.

The defendant was indicted for the offense of burglary. The Court charged the jury that, under the evidence in the case, they could not find the defendant guilty of any other offense than that charged in the indictment, that they must find him guilty of burglary in the night time, (that being the offense charged in the indictment,) or not guilty. The evidence was quite clear that the defendant broke and entered the store-house in the night time, where valuable goods were contained and stored, with intent to commit a larceny, but was prevented from carrying such intention into effect after he had so broke and entered the store-house in the night time. Burglary, as defined by the Code, is the breaking and entering into the dwelling, mansion, or store-house, or other place of business of another, where valuable goods, wares, produce or any other articles of value are contained or stored with intent to commit a felony or larceny, and may be committed in the day or night. The punishment is different when the offense is committed in the night than when com-

mitted in the day time. Larceny from the house is the breaking or entering any house with the intent to steal, or, after breaking or entering said house, stealing therefrom any money, goods, chattels, wares, merchandise or anything or things of value whatever.

Any person breaking and entering any house or building, (other than a dwelling house or its appurtenances) with intent to steal, but who is detected, and prevented from carrying such intention into effect, shall be punished as prescribed in section 4245 of the Code. It is claimed that the 4351st section applies as well to cases of burglary as to larceny from the house. It might be a sufficient reply to say, that the law-making power has not so applied it, and consequently, the Courts cannot do so. Burglary is an offense against the habitations of persons. Larceny from the house is an offense relative to property, and the 4351st section of the Code applies to the latter class of offenses, and not to the former; it was not intended to apply to the offense of burglary. The distinction between burglary and larceny from the house is, that in the one case there must be a breaking and entering into the dwelling, mansion, or store house, or other place of business of another, where valuable goods, wares, produce, or any other article of value are contained or stored, with intent to commit a felony or larceny. When the defendant had broke and entered into any house of the aforesaid description in the night time, with intent to commit a larceny, the offense of burglary was complete, and he might be punished therefor as prescribed by the Code, notwithstanding he may have been detected, and prevented from carrying such intention into effect. But in the case of an indictment for larceny from the house, although the defendant may have broke and entered any house or building (other than a dwelling house or its appurtenances) with intent to steal, but who is detected and prevented from carrying such intention into effect, shall be punished as prescribed by the 4245th section of the Code. This distinction, as to the punishment of the defendant in the two classes of offenses enumerated when he is

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detected, and prevented from carrying his intention into most clearly exists, for the simple reason that the law declares. In the case of larceny from the house, when the defendant breaks and enters the house with intent to steal, detected and prevented, etc., the punishment is mitigated in the case of burglary it is not; if the defendant breaks and enters the description of house mentioned in the statute with the intention to commit a felony, or larceny, and detected and prevented, etc., the punishment is not mitigated that account in an indictment for burglary, and the jury under the law had no right, if they believed the defendant broke and entered the house as charged in the indictment to find a verdict for any less offense than that charged though although they might have believed that the defendant was detected and prevented after he had broke and entered the house from carrying his intention into effect. The offense of burglary was complete, and the law does not relieve him from its consequences, because he was detected and prevented from carrying his intention into effect, as in cases of larceny from the house, and that is the distinction between the two classes of offenses, which the Courts are bound to recognize for the simple reason that it is plainly so written in the Code of Georgia.

WILCOX, GIBBS & COMPANY, plaintiffs in error, vs. J. H. TURNER, defendant in error.

1. Where notes and liens, payable to the order of plaintiffs, for goods sold belonging to them were in the possession of their agent, who had authority to transfer, and were represented by said agent to have been lost, and were found in the possession of the defendant, who was not knowing anything about them on inquiry made, the magistrate's denial of a possessory warrant for the same, properly awarded to the plaintiffs. (R.)
2. The fact that the plaintiffs took the note of their agent for the value of the liens and notes alleged to have been lost, with the stipulation that when found the same should be credited thereon, does not deprive the right of the plaintiffs to the possession of their property. (

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2. Where the evidence which was objected to, if excluded could not have altered the result, it was error in the Superior Court to set aside the judgment of the magistrates. (R.)

Possessory warrant. Principal and agent. Promissory notes. Before Judge GREEN. Rockdale Superior Court. September Adjourned Term, 1871.

For the facts of this case, see the decision.

S. F. WEBB; W. W. GARRARD, for plaintiffs in error.

A. C. MCCALLA; CLARK AND PACE, for defendant.

WARNER, Chief Justice.

This case came before the Superior Court on a *certiorari* from a Justice's Court, complaining of errors in the rulings of the Justices on the trial, and of the judgment of the Justice's Court under the evidence in the case. On the hearing of the *certiorari* in the Superior Court, the Court sustained the *certiorari* and ordered a new trial; whereupon the defendants in *certiorari* excepted. It appears from the return of the magistrates who presided on the trial in the Justice's Court, that a possessory warrant was sued out by Wilcox, Gibbs & Company against Turner, to recover the possession of certain promissory notes and liens which had been in the possession of White, their agent, payable to them or to their order, and that the same had been fraudulently taken possession of by Turner under some pretended claim, without lawful warrant or authority. It also appears from the evidence had on the trial of the possessory warrant, that D. T. White was the agent of Wilcox, Gibbs & Company for the sale of guano, that the notes and liens in controversy were taken by him, as their agent, for their guano sold by him and were payable to them or to their order.

When White was called on for a settlement for the guano sold, he said that he had lost the notes and liens taken by him therefor, and made affidavit to that fact, and then the

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plaintiffs took his note for the amount of the notes and liens alleged to have been lost by him, with a stipulation that when the notes and liens should be found, the amount thereof should be credited on his note. The notes and liens were subsequently found in the possession of Turner; how, or in what manner he obtained possession of them, does not appear. There is positive evidence that White, as the agent of the plaintiffs, had no authority to transfer or to dispose of them, but the evidence does not stop there. Inquiries were made about the loss of the notes, and particularly of Turner, the defendant, who stated to different persons, who were examined as witnesses, that he did not have or know anything about the notes; stated to Albert that, in his opinion, he would never see these papers; that White had lost or destroyed them in some of his drunken sprees, and he would never see or hear of them. These notes and liens were in the lawful possession of the plaintiffs' agent, payable to their order. Their agent had no authority to transfer or dispose of them, and were represented by him to have been lost, and have since been found in the possession of the defendant, who denied knowing anything about them when inquiries were made of him by persons interested to know the truth of the matter. The fact that the plaintiffs took the note of their agent for the amount of the supposed lost notes, with the stipulation that, when found, the same should be credited thereon, does not prevent the plaintiffs from recovering the notes and liens, when found in the possession of the defendant; the supposed lost notes and liens, when found, may be a much better security for the payment of their claims than their agent's note. If we exclude the evidence as to the sayings of D. T. White, and the evidence of Ansley as to his belief that the notes had been wrongfully taken possession of by the defendant, which was the only evidence objected to and admitted, still, there is quite sufficient evidence to sustain and support the judgment of the Justices which was rendered in the case. The question in the case was whether the defendant had the possession of the plaintiffs' lost notes

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and liens under sufficient lawful warrant or authority to authorize him to retain the possession thereof, as against the plaintiffs, under the statement of facts as disclosed in the return of the Justices; and, in our judgment, he had not, and that the Court below erred in sustaining the *certiorari* and ordering a new trial in the case.

Let the judgment of the Court below be reversed.

S. T. W. MINOR, plaintiff in error, vs. GLENN, WRIGHT & CARR, defendants in error.

When there is considerable conflict in the testimony, and the Judge below refuses a new trial, this Court will not disturb the judgment.

New trial. Evidence. Before Judge WRIGHT. Fayette county. At Chambers. January 15th, 1872.

There having been no record forwarded in this case, it is impossible to give a full report of the same. It may be inferred from the bill of exceptions that Glenn, Wright & Carr sued out a factor's lien against S. T. W. Minor for an indebtedness contracted by him in the purchase of a commercial fertilizer known as Zell's guano. The entire contest seems to have been as to the quality of the fertilizer. An immense amount of evidence was introduced by the plaintiff to show that the guano was suitable for the purposes for which sold. The evidence to the contrary in behalf of defendants was very strong. The jury found for the plaintiff, and defendants moved for a new trial because the verdict was contrary to the evidence. The motion was overruled and defendants excepted and assigns said ruling as error.

R. S. DORSEY; TIDWELL & FEARS, for plaintiff in error.

J. S. DOYAL; J. L. BLALOCK; PEEPLES & HOWELL, for defendants.

Tidwell *vs.* Hewell *et al.*

McCAY, Judge.

It would be going far to interfere with this verdict. The evidence on both sides was the subject of consideration for the jury. True, it may preponderate, in our judgment, against the verdict. But we are not a Court of appeal from the verdicts of juries upon the facts. Is the verdict illegal—does it display manifest mistake or prejudice? We think not. The defendants' testimony, though apparently very positive, is in fact only so in opinion, and not in statement of material facts. All these witnesses only say the guano did in fact do no good. They do not show the season was not unpropitious for guano—that it was not very dry. Indeed two of them say, in effect, one that the cotton did grow higher, and the other that it opened sooner. These are the two particulars in which manure shows itself. If, notwithstanding this, there was not a good crop, the conclusion is very natural that it was for some other reason than the worthlessness of the fertilizer. In such a case as this, especially ought the verdict of the jury in favor of *the plaintiff* have special significance.

Judgment affirmed.

M. M. TIDWELL, plaintiff in error, *vs.* JOHN T. HEWELL *et al.*, defendants in error.

A judgment based upon a note for the hire of a negro, being the oldest, is entitled to a fund in Court for distribution. (R.)

Constitutional law. Negro hire. Money rule. Before Judge WRIGHT. Fayette Superior Court. October Adjourned Term, 1871.

For the facts of this case, see the decision.

TIDWELL & FEARS, for plaintiff in error.

J. L. BLALOCK ; R. S. DORSEY, for defendants.

WARNER, Chief Justice.

This case came before the Court below on a motion to distribute money in the hands of the Clerk. The law and the facts, by agreement of the parties, was submitted to the presiding Judge for his decision, and, after hearing the evidence, decided that Tidwell's judgment, (which was admitted to be the oldest,) was not entitled to be paid, because the note on which it was founded had been given for negro hire. This decision of the Court was error.

Let the judgment of the Court below be reversed.

SUSAN PAIGE, plaintiff in error, vs. C. M. DODSON, defendant in error.

1. When in a proceeding against one as an intruder, the defendant's affidavit taken before the sheriff, was that she "claims the *bona fide* legal right to the possession" of the premises:

Held, That this was a compliance with the section 4000 of the Revised Code. The fact that the word "the" is placed before the words "*bona fide*" being an evident clerical mistake, the real meaning being that she "claims, *bona fide*, the legal right to the possession."

2. The counter-affidavit to proceedings to eject an intruder cannot be amended, nor can a second be made. (R.)

Proceedings against intruder. Counter-affidavit. Before Judge WRIGHT. Campbell Superior Court. October Adjourned Term, 1871.

C. M. Dodson sued out a warrant against Susan Paige, as an intruder, for the possession of a certain lot of land in the county of Campbell. The defendant filed a counter-affidavit to the effect "that she claims the *bona fide* legal right of possession" to said lot, "and that she is not holding possession under C. M. Dodson, nor any person that he is." When said cause was called for trial, plaintiff moved to dismiss said

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counter-affidavit, because it failed to comply with the statute.

The motion was sustained by the Court and defendant excepted, and now assigns said ruling as error.

TIDWELL, FEARS & ARNOLD, for plaintiff in error.

No appearance for defendant.

McCAY, Judge.

The Code, section 4000, requires the counter-affidavit to an intruder's warrant to state, "that he does in good faith claim a legal right to the possession." The words of this affidavit are, "that she claims the *bona fide* legal right to the possession." The Court dismissed the affidavit, because it did not conform to the statute. We think this was too rigid an adherence to the letter of the law. Very clearly this was a mere clerical error; a mere misplacement of the word "the." Had the affidavit said "she claims, *bona fide*, the legal right," "or she claims, the legal right, *bona fide*," it would have complied literally with the law. This is a very hard law on defendants. The sheriff appears at one's door with an intruder's warrant. His duty is to turn the defendant out "at the earliest practicable day," unless the counter-affidavit is filed. It is perhaps a long way to a lawyer; the sheriff is a competent officer to administer the oath; one is written, sworn to and accepted, and the papers returned. The affidavit is bunglingly drawn—a word is misplaced—"the" is put after "*bona fide*" instead of before. The affidavit cannot be amended: 20 *Georgia*, 105; a second one cannot be put in: 36 *Georgia*, 477; and the defendant loses his possession for a misplacement of one word in his affidavit. We doubt if this Act ought to be construed strictly as to the defendant. It is a harsh, speedy process that should be strictly complied with by the plaintiff; but in my judgment, whilst the affidavit of the defendant should in substance comply with the Act, a literal compliance is not necessary. The case before us is evidently a mere error in the use of words, the intru

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was to comply, and we think the substance of the statute has been conformed to. Very evidently the meaning is "*bona fide* claim;" *bona fide* possession is nonsense. The affidavit ought to be read, "does *bona fide* claim the legal right." Let the plaintiff tender an issue on it, as thus read.

Judgment reversed.

R. M. LONG, executor, plaintiff in error, vs. JOHN R. HOOD,
defendant in error.

1. When the plaintiff's name is signed to an attachment bond by his attorney, the plaintiff's name should be followed by the words "by his attorney-at-law," to which should be added the attorney's name. (R.)

2. An attachment bond is amendable. (R.)

3. Where the defendant has replevied the property attached, and has appeared and pleaded to the merits of the case, the plaintiff has the right to try the case as at common law. (R.)

Attachment bond. Attorney and client. Amendment.
Before Judge WRIGHT. Carroll Superior Court. April
Term, 1872.

For the facts of this case, see the decision.

OSCAR REESE, represented by W. D. ELLIS for plaintiff in error, submitted the following brief: An attorney may sign his client's name to an attachment bond: Code, sec. 3201. Attachment laws are liberally construed: 36 Ga. R., 90. Substantial compliance as to bond sufficient: Dudley's R., 69; 3 Ga. R., 271; 5th *Ibid.*, 178; Code, sec. 4. An instrument may be binding though signed in the body of it or on the back: 26 Ga. R., 223; Chitty on Contracts, 71. Principal bound when: 39 Ga. R., 35. Attachment bonds are amendable: Code, sec. 3240; 27 Ga. R., 65; 29th *Ibid.*, 642. Appearance and pleading waives process and the service hereof: Code, secs. 3233, 3259. No declaration shall be

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dismissed because the attachment has been dismissed: Code sec. 3233.

No appearance for defendant.

WARNER, Chief Justice.

This was an attachment taken out by the plaintiff's attorney in the name of his client against the property of the defendant. The attachment bond was signed by Oscar Reese, attorney-at-law, for John Long. A motion was made to dismiss the attachment, on the ground that the bond was not a legal bond, which motion was sustained. The plaintiff then made a motion to amend the bond, which was refused by the Court. The property levied on had been replevied by the defendant. The plaintiff had filed his declaration in the case, and the defendant had appeared and filed his plea to the merits thereof. The plaintiff claimed the right to proceed with the trial of the case as in a common law suit, the defendant in attachment having appeared and pleaded to the merits of the action founded thereon, which was also refused, and the plaintiff excepted. As a matter of practice, and in strict conformity with the law, the plaintiff's attorney should have signed the name of John Long to the bond by his attorney-at-law Oscar Reese. The bond, however, was amendable, and it was error in the Court in refusing to allow it to be amended Code, section 3240. The defendant having replevied the property attached, and having appeared and pleaded to the merits of the plaintiff's declaration founded on the attachment filed in Court, it was error to refuse the plaintiff the right to try the case as at common law against the defendant Code, 3233, 3234, 3252.

Let the judgment of the Court below be reversed.

Seago vs. Pomeroy.

ALVIN K. SEAGO, plaintiff in error, *vs.* R. S. POMEROY,
defendant in error.

It is error in the Court to charge the jury in a trover case, that a demand and refusal is proof of conversion, it not appearing that the property sued for was in the possession, power, or control of the defendant, at the time of the demand and refusal, but if in such a case there be conclusive proof of a conversion in fact, a new trial ought not to be granted.

When the owner of a past due promissory note placed it in the hands of A for collection, and A sold it to B, and B converted it to his own use: ~~That~~ That the true owner might maintain trover for the note against B, and that B got no title by his purchase from the agent.

Trover. Conversion. Promissory note. Before Judge HOPKINS. Fulton Superior Court. October Term, 1871.

R. S. Pomeroy brought trover against Alvin K. Seago for a promissory note made by one A. M. Parker, principal, and W. J. Joiner, security, payable to L. W. Summerlin or bearer, dated January 4th, 1860, and due December 21st, 1860, for \$450, with the following credits indorsed thereon, to-wit: March 5th, 1861—Received on this note \$20 00. March 5th, 1861—Received on this note \$25 00. May 31st, 1861—Received on this note \$25 00; which said Seago, on February 22d, 1866, converted to his own use.

It appeared, from the evidence, that plaintiff, on February 22d, 1866, placed the note described in the declaration in the hands of one Joe Beerman, now deceased, for collection and took a receipt, as follows:

"Received, February 22d, 1866, of R. S. Pomeroy, a note signed by A. M. Parker and William J. Joiner, dated January 4th, 1860, payable 25th day of December of the same year as given. The above note is given to me to be collected; if not collected, to be returned to R. S. Pomeroy, when called for. [Signed] JOE BEERMAN."

That having heard from Parker, the maker, that it had been in possession of defendant, plaintiff demanded the note from him; the demand was in writing, made on September

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10th, 1867; that defendant refused to deliver up the note, saying that he had purchased it from Joe Beerman; that A. M. Parker was solvent and the note could have been collected; that the demand was before suit brought; that a verbal demand had been made from one to three months before the written; that on June 30th, 1866, defendant called on Parker and requested him to give a new note, which Parker did; that the new note was dated June 30th, 1866, and was for \$506 40, with interest from date; that Parker afterward paid off the note, or, rather, the judgment obtained upon it, to the attorneys of McCoy, of North Carolina; that McCoy was plaintiff in *fi. fa.*

The plaintiff elected to take a verdict for damages.

The jury found for the plaintiff \$650 20. The defendant moved for a new trial upon the following grounds, to-wit:

1st. Because the Court erred in charging the jury, "that if the testimony showed that the plaintiff was the owner of the note in question, and that he placed it in the hands of Beerman for collection after it had become due, and further, that Beerman did not collect the note but sold it to defendant, and the plaintiff made demand upon defendant for the note before suit brought, and defendant failed to deliver the note, plaintiff is entitled to recover."

2d. Because the Court erred in charging the jury, "that the note itself was *prima facie* evidence of its value, and, unless the proof shows that the note was not worth as much as it called for, plaintiff is entitled to recover the amount of the note, principal and interest, provided he has shown that he is entitled to recover at all."

3d. Because the verdict is contrary to law and to evidence.

The motion for a new trial was overruled by the Court, and defendant excepted and now assigns said ruling as error.

POPE & BROWN, for plaintiff in error. The evidence in this case proves both too little and too much for this verdict to stand: 1st. *It fails to prove* that Mr. Seago had possession of the note when the demand was made upon him.

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mand and refusal are not evidence of a conversion unless thing demanded were, at the time of the demand, in possession of the defendant: *Rice vs. Clark*, 8 Vt., 110; *Knapp Winchester*, 11 Vt., 351; *Pale vs. Saunders*, 16 Vt., 243; *aylor vs. Hovell*, 4 Black., 2 Ind., 317; *Morris vs. Thompson*, 1 Rich., S. C., 65. The truth is, Seago did not have the note at the time; he had transferred it to McCoy, of North Carolina, who had it in suit. 2d. *It does prove* that Pomeroy waited sixteen months after he gave the note, payable to bearer, to Joe Beerman to collect, and before he made a demand of Seago, who bought the note without any knowledge of the agency or instructions of Beerman. *Pomeroy, by this delay, has ratified the tort*, if any was committed by Beerman in selling the note instead of collecting it and applying the proceeds: Story on Agency, sec. 255; *Symonds vs. Atkinson*, Eng. L. and Eq., 585; *Owelly et al. vs. Woolhopter*, 14 L., 124; *Mapp vs. Philips*, 32 Ga., 72; Code, sec. 2166; and he is presumed, after so long a delay, to have been advised of the acts of his agent, Beerman, for it was the agent's duty to report to him within a reasonable time what he had done with the note: Story on Agency, sec. 208. And the presumption is that the agent did his duty. If he did not, Pomeroy was guilty of *laches* in not demanding a report. 3d. The mere delivery of a note payable to bearer, although overdue, is an authority so far as innocent third persons are concerned to act as owner of that note either in selling or collecting it: 11 Foster, 483; 4 Barb., 373; 13 Vt., 540. The evidence shows that Beerman applied to borrow money of Pomeroy, and Pomeroy having none, let him have this money, etc. A note overdue represents so much money due, and in this differs from any other personal property; and any instructions to the agent are not limitations of that authority, and do not affect Seago's title: Story on Agency, sec. 73, 133; 33 Barb., 248; 9 S. and M., 476; 10 N. H., 307; Code, sec. 2170. To establish any other rule would be to encourage fraud and lay a trap for the innocent. Where two must suffer, it must be him who puts it in the

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power of a third person to injure, and not him who is injured. 15 East., 408.

HILL & CANDLER, for defendant.

McCAY, Judge.

The proof of conversion in this case is conclusive. Without doubt, Mr. Seago applied this note to his own use, negotiated it, got what he thought its value for it. This is a conversion, to-wit: an application of it to his own use, although, therefore, there may have been error in the case as to the effect of a demand and refusal, still the defendant was not hurt because the proof of conversion is conclusive. A demand and refusal is not conversion; it is only evidence of conversion, and to make it such, it must appear that the defendant had it in his power to deliver. But if the conversion be proven in fact, as was clearly done here, no evidence was necessary, and the charge of the Court as to the effect of a demand and refusal is immaterial; 2 *Georgia*, 1 *Georgia*, 381. An attorney or other person taking a note for collection is only a bailee of it. He has no right to convert it in any other way than his authority justifies: *Storrs v. Agency*, 224; 6 East., 537; 7 East., 4; 13 Mass., 398. Also the case of *Goodwin vs. May*, 23 *Georgia*, 205. Nor does the evidence show such delay by the true owner to deliver his rights as to amount to a ratification of the act of the agent. There is no evidence that he delayed at all after he knew or had any hint as to what had been done with the note. He had a right to presume that the agent had failed to collect the note, and was holding it for him, nor was the presumption at all unreasonable; indeed, in the circumstances of the country it was the most natural of all presumptions.

Whatever may be the common law rule as to the title required by the purchaser of a promissory note, payable to the bearer, from one who has no right to it, our Code settles that unless the note be not yet due, it stands on the same footing as other property. Section 2597 of our Code

Kidd vs. Lester.

vides that the seller can convey no better title than he has himself. The *bona fide* purchaser of a negotiable paper, *not dishonored*, or of money or bank bills, or other recognized currency, will be protected, though the seller had none. To say that an agent or bailee, intrusted with property, may, because he has the possession—which is, as to personal property, a *prima facie* title—may sell it, contrary to his authority, and divest the title of the true owner, would be to break up the whole system of agents, bailees, etc. See the case of *First National Bank of Macon vs. Nelson & Company*, 38 Georgia, 391.

Judgment affirmed.

WILLIAM H. KIDD, administrator, plaintiff in error, *vs.*
GEORGE H. LESTER, administrator, defendant in error.

A widow, who has no children living with her, dependent on her for support, is not entitled to a homestead out of the property of her deceased husband, as the head of a family, according to the true intent and meaning of the Constitution of 1868. (R.)

Homestead. Widow. Head of a family. Before Judge **ANDREWS**. Oglethorpe Superior Court. October Adjourned Term, 1871.

For the facts of this case, see the decision.

W. G. JOHNSON ; **W. W. MCLESTER**, for plaintiff in error. The widow is entitled to the homestead : 40 Ga. R., 558 ; *Ibid.*, 440 ; 15 Ga. R., 411 ; Code, sec. 2022 ; 1 Wash. on R. P., 325, *et seq.* ; 39 Ga. R., 437 ; 40 Ga. R., 486 ; Code, sec. 1747 ; 8 Cal. R., 71 ; 14 Cal. R., 476 ; 16 Cal. R., 217 ; 5 Min. R., 337 ; 7 Min. R., 520 ; 32 Tenn. R., 514 ; 7 Texas L., 19.

J. D. MATHEWS, for defendant. A single person, with no one dependent upon him or her, is not the head of a family : 1 Ga. R., 405 ; 41 Ga. R., 153 ; 40 Ga. R., 173.

 Armistead vs. McGuire.

WARNER, Chief Justice.

The only question made by the record in this case whether a widow, who has no children living with her dependent on her for support, is entitled to a homestead of the property of her deceased husband, as the head of a family according to the true intent and meaning of the Constitution of 1868. The manifest intention of the Constitution was to provide for the families of minor children, and to authorize the applicant to have a homestead he or she must be the head of a family, or guardian, or trustee of a family of minor children, and this intention is the more apparent because it is made the duty of the General Assembly, by the Constitution, to provide, by law, for the setting apart the homestead for the *sole use and benefit of said families*, as aforesaid not for the use and benefit of those who have no family to whom they are legally bound to support. In our judgment the applicant, under the statement of facts contained in the record, was not entitled to a homestead in the property of her deceased husband as the head of a family, as contemplated by the Constitution: *Lynch vs. Pace*, 40 Georgia Reports, 173; *Calhoun vs. McLendon*, 42 Georgia Reports,

Let the judgment of the Court below be affirmed.

JOHN ARMISTEAD, plaintiff in error, vs. C. P. McGUIRE, defendant in error.

Where the language of an instrument in writing is ambiguous, and may be fairly understood in more ways than one, it should be taken in the sense put upon it by the parties at the time of its execution, and the Court will hear evidence as to the facts and surroundings, and decide according to the truth of the matter.

Injunction. Construction of contract. Parol evidence. Before Judge HOPKINS. Fulton county. At Chambersburg, July 6th, 1872.

Armistead vs. McGuire.

Armistead filed his bill against C. P. McGuire, containing substantially the following allegations, to-wit: That complainant represents the interest of his wife and children in the management of a tract of land near the city of Atlanta, which is situated the Ponce de Leon Spring, said to contain valuable medicinal properties, to which many citizens resort for health and pleasure; that complainant and his wife now use it and have used it for a great length of time for domestic purposes; that on April 15th, 1872, the following contract was entered into between complainant and the Hibernian Benevolent Society, to-wit:

ATLANTA, GEORGIA, April 15th, 1872.
 is agreement, entered into between John Armistead of the first part and the Hibernian Benevolent Society, of the second part, sheweth that the aforesaid John Armistead doth hereby rent the property in and about the Ponce de Leon Spring free, from the date above mentioned until the 13th of November, 1872. And the Hibernian Benevolent Society of the second part, do hereby agree to build a platform and other improvements as they may deem necessary for the use; and they are to have the renting of the same during the dates above mentioned; and further, they do hereby turn over all improvements made by them on the premises during the dates above mentioned; and further, it is that no person, persons or society, outside of the Hibernian Benevolent Society, shall have any privilege of selling or drinking any kinds of liquor or other drink on said premises, or any other lands adjoining belonging to said property without the consent of the said Hibernian Benevolent Society.

[Signed]

JOHN ARMISTEAD.

Hibernian Benevolent Society:

[Signed]

J. T. GRADY,
 H. H. BRANCH,
 C. P. MCGUIRE,
 Wm. CARROLL."

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That the complainant has prepared for the sale and distribution of the waters of said spring to the citizens of Atlanta, by the purchase of two teams and two wagons, which he keeps constantly employed; that said waters are not sold, but complainant's profits arise from being liberally rewarded for the delivery of the same; that the defendant has had the management of the place under the contract, and has made some temporary improvements thereon, mostly for the purpose of accommodating the drinking and dancing persons of the community, and as the waters have not been much patronized by either class specified, said improvements have not been as profitable, perhaps, as they otherwise would have been, and have been permitted, measurably, to fall into disuse; that the whole community, up to this time, has had the uninterrupted privilege of using said waters, and complainant has had the privilege of delivering to invalids and others a supply of said waters; that complainant and his family have had the privilege of using said waters for all domestic purposes, without let or hindrance, complainant never having intended to convey any right or privilege of said waters of an exclusive character; that recently said defendant has notified complainant that he claims the exclusive right to said waters, which claim is predicated exclusively on said contract, and that neither complainant nor his family, nor any other person, shall use said waters without paying for the privilege; that said defendant has hauled lumber and is proceeding to fence in said spring, so as to enable him to accomplish his purpose in this behalf; that the damages to complainant, his family, and the whole community will be irreparable; that the defendant is insolvent; that complainant is remediless at common law. Prayer, that the writ of injunction may issue restraining the defendant from building upon, or putting any obstructions around or about said spring for the purpose of preventing complainant or the community from the use of said waters, or preventing access to said spring, or in any manner preventing complainant from the sale of said waters. Several affidavits were presented sustaining the construction

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on said contract by the foregoing bill. The Chancellor reversed the injunction and complainant excepted, and the court affirmed the ruling as error.

By W. R. HAMMOND, for plaintiff in error. 1st. In the subject matter of the contract is to be fully considered: 2 Pars. on Con., 499. 2d. The situation of the property at the time, and of the property which is the subject of the contract must be fully considered: 2 Pars. on Con., 501. 3d. The whole contract should be considered: 1 Pars. on Con., 501. 4th. Contemporaneous facts may be proved by extrinsic testimony: 2 Pars. on Con., 561, and 1st. Ev., 297 to 300. 5th. Injunction granted at law is imperfect: 2 Story's Eq. Juris., secs. 956.

Verdict for defendant.

7, Judge.

It is clear from the written paper set forth in this case that the parties to it meant, as to the matter in dispute, that there are expressions in the paper inconsistent with the claim set up by the defendant, and it is apparent that such was not the intention of the parties. In the surroundings, the nature of the property, the circumstances of the complainant's making of it, and the expressed motives of the defendant, we think there are strong reasons for thinking no such exclusive right was intended to be claimed by the defendant, as he now claims. Taking the instrument together, however broad some particular words may be, there is an ambiguity as to what is intended. Under the Code, section 3748, the surroundings and circumstances of the parties may be used to explain the true meaning in doubtful cases. We think it proper here to justify and require the jury to pass upon the meaning, and that the injunction ought to have been granted until the hearing. We take it that the Judge

Hambrick vs. Dickey et al.

felt himself bound to construe the deed from itself. But under the law as it stands in the Code, the circumstances, and especially the expressed intent of the parties, may, in cases of doubt and ambiguity, be inquired into.

Judgment reversed.

THOMAS HAMBRICK, plaintiff in error, *vs.* JOHN DICKEY,
et al., defendants in error.

Where it appeared that the debt for which the execution was issued was contracted prior to June 1st, 1865, that it was for the unpaid purchase money due for the land levied on, that the complainant was, at the time of the commencement of the action on which the judgment and execution were founded, in possession of the land, and is still in possession, it was proper in the Chancellor to refuse an injunction against the sale of the property under said execution, applied for on the ground that the taxes on the debt had not been paid. (R.)

Relief Act of 1870. Injunction. Before Judge GREENE.
Henry Superior Court. October Term, 1871.

Thomas Hambrick purchased, in December, 1860, from John Dickey, a certain tract of land for \$4,000, paying \$2,000 in cash and giving his notes for the balance, payable at one and two years. In the year 1867, John Dickey recovered judgment on said notes and levied the execution based thereon upon the said land. Hambrick has been, from the time of the purchase and is still, in possession of the property. He filed his bill to enjoin the sale under said levy, setting up the relief contemplated by the Act of October 13th 1870, also the non-payment of taxes by Dickey. A temporary injunction was granted. Upon the hearing of the motion to continue said injunction, the Chancellor directed "that the said injunction be dissolved and the bill be dismissed on the ground that the *fi. fa.* is founded on a debt for the purchase-money of the land levied on, and in possession of which complainant has been since the said debt was levied on until this time." Whereupon the complainant excepted and now assigns said ruling as error.

DOYAL & NUNNALLY; E. W. BECK, for plaintiff in error.

J. R. NOLAN; JOHN J. FLOYD, for defendants.

WARNER, Chief Justice.

The complainant filed a bill against the defendant praying an injunction to restrain the sale of a tract of land under execution obtained by the defendant against the complainant, on the ground that the taxes due upon the debt had not been paid. On the hearing of the case, the Judge dissolved the injunction which had been previously granted, and the complainant excepted. It appears from the statement of facts closed in the record, that the debt for which the execution issued was contracted prior to the first of June, 1865, that it was for the unpaid purchase-money due for the land sold on, that the complainant was at the time of the commencement of the action on which the judgment and execution was founded, in possession of the land, and has continued in possession of the same up to the present time; and the question made for the decision of this Court is, whether, under the fifteenth section of the Act of 1870, the defendant is exempted from having his case dismissed or is entitled to collect his debt when it is for the purchase-money of the land, and the complainant is and has been in possession of the land ever since the commencement of the action. In our judgment, the defendant in the bill is excepted from the operation of the provisions of the Act of 1870, and that his case is embraced within the fifteenth section of that Act. The complainant is in the possession of the land, enjoying the benefit of it, and has not paid for it. Should he not be compelled to pay the purchase-money for the land? Is it just or equitable that he should have enjoyed the possession and benefit of the land and not pay for it? We are unwilling to give such a construction to the act that the judgment of the Court below be affirmed.

Gilbert vs. Dent.

JOHN D. GILBERT, plaintiff in error, vs. JAMES DENT, defendant in error.

When a suit was brought on a promissory note, signed by one claiming to be the agent of the defendant, and there was some evidence that the defendant had accepted, knowingly, the consideration for which the note was given :

Held, That it was error in the Court to rule out the note as evidence. The case should have been submitted to the jury, under the charge of the Court, as to the effect of the defendant's act, should they believe he had accepted, knowingly, the consideration for which the note was given.

Promissory note. Evidence. Power of attorney. Before Judge COLE. Bibb Superior Court. November Term, 1871.

John D. Gilbert brought assumpsit against James Dent upon a promissory note, alleged to have been made by defendant, by J. R. Marshall, his attorney in fact, on July 20th, 1870, payable on the 15th of November next thereafter, to plaintiff, or bearer, for the sum of \$222 58.

The defendant pleaded *non est factum*. It appears from the evidence that the defendant executed the following power of attorney :

"STATE OF GEORGIA—DOUGHERTY COUNTY :

"Know all men by these presents that I, James Dent, of Bibb county, Georgia, do constitute and appoint Joel R. Marshall, of Dougherty county, Georgia, as my agent and attorney to look after my effects in said county, and to see that B. F. Lancaster and J. T. Champion, now of said county, and renters of my plantation in said county, for the year 1870, do return all things back, according to contract and agreement, and also the fifty bales of cotton, and all other advances that James Dent may make. And, in case that B. F. Lancaster and J. T. Champion should fail to deliver the cotton and other things, according to contract and agreement between myself, James Dent, of Bibb county, and B. F. Lancaster and J. T. Champion, now of Dougherty county, Georgia, my agent, Joel R. Marshall, must take all necessary

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my effects and interest, and to employ counsel as
May 11th, 1870.

signed) "JAMES DENT. [L. s.]

ted) M. M. SHIPP."

b. Marshall testified, that the defendant gave him to receive from Lancaster and Champion his (de-) share of the crop, the plantation, stock and all property; that defendant was absent at the springs, and was residing in Dougherty county, on defendant's land; that Lancaster and Champion failed in their operations, and to get rid of them, and to extinguish their claim to the crop of 1870, witness, as agent of defendant, agreed to pay the claim of plaintiff against said land also to pay to them \$100; that witness had no intention to do this, but he thought it best for defendant's interest that, after the payments were made to Gilbert (the plaintiff) and Champion, he received a letter from defendant directing him to pay out nothing; that witness reported the letter to defendant and he repudiated it entirely and refused to pay; that, through this transaction, witness was not to take possession of the stock and crop then on the land, but that the only real benefit received by defendant in his possession of his plantation was that an opportunity was afforded for gathering the crop and of taking care of his land; that plaintiff, in the arrangement, agreed to take on himself his claim; that witness does not know that defendant is finally liable on this claim; that the contract between plaintiff and defendant was, substantially, as follows: the plaintiff was to give defendant fifty bales of cotton and return to plaintiff payments of corn, fodder, utensils, cotton and other things; that plaintiff was to pay all damages resulting from their neglect; that the contract was for one year; that, at the time said note was given, there was no prospect of obtaining the contracted rent; that the inducement to defendant to get his place back was that he might save something; that defendant saved all that

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was gathered, and if Champion had been permitted to remain, but little would have been raised and much lost and wasted; that the expenses of running the farm and gathering the crop fully equaled the value of the possession to defendant.

The plaintiff testified that Champion was defendant's tenant for the year 1870, and refused to give up possession unless the note sued on was made; that plaintiff's account was just twice the amount of the note; that the benefit to defendant was, he obtained possession of his plantation; that the account in favor of plaintiff was for supplies furnished to the place; that plaintiff refused to accept the note made by Marshall until he saw his power of attorney.

After introducing the foregoing evidence the plaintiff tendered the note sued on. On objection made, the Court excluded the same, and plaintiff submitted to a non-suit and excepted to the aforesaid ruling, and now assigns the same as error.

LYON & IRVIN, for plaintiff in error.

LANIER & ANDERSON, for defendant.

MCCAY, Judge.

We think the Court should have submitted the note with the other evidence to go to the jury. There was some evidence of ratification by the defendant. We do not say that the agent had authority, under the power of attorney, to sign the defendant's name to the note, nor are we prepared to say that the *mere fact* of his taking possession of his own deserted farm is to be considered evidence of ratification. But there is more than this in the evidence—we will not say how much—but under the numerous decisions of this Court on the subject of non-suit, we are not prepared to say that there was *no* proof of ratification: 15 *Georgia*, 491; 32 26; 35th, 132; 5th, 171. A man is not permitted to ratify an act of his agent so far as it is for his own benefit and

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repudiate that part of it he does not like. If the defendant below *accepted* this plantation and crop as returned to him by the tenant, under the contract with the agent, he must take it altogether. He cannot *take back the land, crop, etc.*, without taking it with the burden put upon it by the contract. If, however, he did not take back his place, etc., but repudiated the whole; and finding his place deserted, his stock neglected, went upon the place to save what he could, then he did not ratify. We think the note, with all the evidence, ought to have gone to the jury under proper instructions as to the law.

Judgment reversed.

EDWIN R. ANTHONY AND WIFE, plaintiffs in error, vs. ALEXANDER H. STEPHENS *et al.*, defendants in error.

1. Where property which came by the wife and to which the marital rights of the husband have attached, is conveyed away by the wife, with the full knowledge and consent of the husband, he is estopped from claiming title to the land. (R.)
2. Where to a deed the words, "On the express understanding and agreement on the part of said A. H. S. (the grantee) that the lot of land so conveyed is never to be sold to or occupied by negroes," are attached, they are words of covenant and not of condition. (R.)
3. The discretion of the Chancellor in refusing an injunction will not be interfered with, unless abused. (R.)

Injunction. Condition in deed. Covenant. Notice. Stoppel. Before Judge COLE. Bibb county. At Chambers. July 11th, 1872.

Edwin R. Anthony and his wife, Susan S. Anthony, filed their bill against Alexander H. Stephens, William P. Carlos, Austin Brighthaupt and his wife, Rose Brighthaupt, making the following case:

Susan S. Anthony, while a widow, purchased three lots in the city of Macon, lying side by side. She married Edwin

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R. Anthony in the month of May, 1862, his marital rights thereby attaching to said property, though he generally allowed his said wife to manage the same. The complainants reside on one of said lots, one is vacant, and the third is the subject-matter of this litigation. Alexander H. Stephens approached the said Susan S. for the purpose of purchasing said lot, with a view, as he then stated, to building a house thereon for himself and his mother's family. Previous to this time said Susan S. had had frequent applications from persons of color to purchase said lot, but had refused to sell to them because such a disposition of said property would have injured the sale of the other vacant lot and the value of her house. Alexander H. Stephens, knowing these facts, and with the understanding that he would build and reside thereon, purchased the said lot for the sum of \$900, \$600 of which amount was paid in cash, and \$300 some six or eight months thereafter, (on April 9th, 1869,) when said Susan S. executed a deed to said lot to Mrs. Emeline Stephens, as guardian for said Alexander H. Some time after the execution of said deed, Austin Brighthaupt, a person of color, was seen examining said lot, and said Susan S., fearing that said Stephens would sell to him, she sent her son to said Stephens to protest against it. Stephens replied that Austin was very anxious to buy, but that he would not sell to him if he could find another purchaser who was white. Soon after this Austin took possession of the lot, built a fence around it and planted shade trees; but when said Stephens was about to execute a conveyance to said Austin, it was discovered that the deed from said Susan S., never having been signed by her said husband, conveyed no title. Said Edwin R. declined positively to sign the deed, as he knew it would affect the value of the two remaining lots. Stephens then proposed to take the lot back from Austin, and said that one Green & Blake had agreed to lend him the money to pay Austin and that he would agree in writing that if complainants paid to him a stipulated price within three months, and would both sign the deed, he would convey the lot back to them.

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agreement was drawn up, signed and delivered to complainants on March 4th, 1872. On the same day a second was executed to said lot, signed by both of complainants containing the following clause attached to the warranty: the express understanding and agreement on the part of said Alexander H. Stephens that the lot of land so conveyed was to be sold to or occupied by negroes." Stephens refused to return the old deed, but has failed to do so. Soon after this Austin commenced to build on said lot. The son of said Susan S. called on Stephens and asked him what it was. He replied that he did not know whether Austin intended to build on the lot or not; that he had sold it to said P. Carlos. Complainant's son stated that it was agreed to let Austin have it from the beginning, arranged between said Stephens, Carlos and Austin, and at the same time said Stephens what he meant to do about the written agreement he had given to let complainants have the lot back, which he replied that he did not intend to let them have it back when he signed said agreement. On March 26th, said Stephens conveyed said lot to said Carlos, and on the same day, for the same consideration, said Carlos conveyed the same to Rose Brighthaupt, the wife of said Austin. The value of defendants is worth more than \$3,000 in gold, therefore complainants would be remediless at law. At the time the second deed was signed, Stephens stated that he intended to deposit it as collateral security with Blake, in order that he might raise money with which to pay Austin.

Complainants pray that defendants may be restrained from proceeding with their unlawful and fraudulent building and improvements on said lot; that the deeds referred to may be set aside; that the said Stephens may be decreed to carry out the agreement in writing, and to reconvey to complainants the lot on the terms therein stated.

Answers of the defendants admitted the allegations in reference to the various conveyances, but denied fraud and conspiracy to injure complainants, and denied material allegations. Austin Brighthaupt denied

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all notice of the restriction contained in the deed of March 4th, 1872, or of the agreement entered into by Stephens to reconvey to complainants, at the time he purchased the said lot for his wife, Rose. He also stated that his house and other improvements were completed at the time he was served with a copy of said bill.

Several affidavits were read on the hearing of the application for injunction, unnecessary here to be set forth.

The injunction was refused, and complainants excepted and assign said ruling as error.

NISBETS & JACKSON, represented by THE REPORTER, for plaintiffs in error.

LANIER & ANDERSON, by brief, for defendants.

WARNER, Chief Justice.

This was a bill filed by the complainants against the defendants, praying for an injunction to restrain Austin Brighthaupt and his wife, Rose, persons of color, from exercising acts of ownership over a certain city lot in the city of Macon, or further building thereon, on the ground that there is a clause in the deed conveying the lot to Stephens by the complainants, dated 4th March, 1872, under whom it is alleged the defendants claim title, in the following words: "On the express understanding and agreement, on the part of the said Alexander H. Stephens, that the lot of land so conveyed is never to be sold to or occupied by negroes." We are inclined to the opinion that the first deed executed by Mrs. Anthony to Stephens, with the full knowledge and consent of her husband, would have estopped him from setting up a claim or title to the land, and that Stephens and those claiming under him acquired a good title to the lot, against the complainants, under that deed, wholly independent of the subsequent deed, executed the 4th of March, 1872, containing the alleged restriction. The defendant, Austin Brighthaupt, denies all knowledge of the restriction.

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tained in the deed of 4th of March, 1872, when he purchased and paid for the lot, and it appears that he went forward and built a house on the lot before the complainants took any steps to restrain him. The words contained in the deed of 4th March, 1872, are words of covenant, and not words of condition, and the evidence of the insolvency of the defendants is not at all satisfactory.

In view of the facts disclosed in the record of this case we will not interfere with the exercise of the sound discretion of the presiding Judge of the Court below in refusing to grant the injunction prayed for.

Let the judgment of the Court below be affirmed.

B. B. ODOM, plaintiff in error, *vs.* WILLIAM C. GILL, defendant in error.

An appeal would, by section 3554 of the Code, lie from the verdict of the jury in the County Court, in a collateral issue, at the discretion of the Judge presiding in said Court.

County Court. Appeal. Collateral issue. Before Judge CLARK. Lee Superior Court. March Term, 1872.

B. B. Odom obtained a rule absolute against William C. Gill, former sheriff of Lee county, at the February Term, 1861, of Lee Inferior Court, requiring him to pay to said Odom the sum of \$304 50 principal, and \$15 85 interest, within sixty days, or on failure thereof to be attached for contempt.

The money was never paid. The Inferior Court was abolished, and its business transferred to the County Court. At the January Term, 1867, of the County Court, William C. Gill upon divers grounds moved that the aforesaid rule absolute and order for attachment be vacated. Odom traversed the grounds of the motion, and the issues were submitted to jury, which found in favor of the movant. Application

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was made by respondent for the privilege of appealing to Superior Court. The Court allowed the appeal. When case was called in the Superior Court, Gill moved to dismiss the appeal, upon the ground that the case could not be brought up in that manner. The motion was allowed; the appeal dismissed. To which ruling Odom excepted, and now assigns the same as error.

R. J. & L. P. D. WARREN, for plaintiff in error.

FRED. H. WEST, represented by CLARK & GOSS, for defendant.

McCAY, Judge.

This appeal must have been dismissed without any examination of the Code. Section 3554, Revised Code, expressly provides that an appeal will lie to the Superior Court, from the verdict of a jury in the County Court, on a collateral issue: *Provided*, the Judge of the County Court, in the exercise of his discretion, permits it. This, as the record shows the Judge of the County Court has done, and the right of appeal would seem to be complete. It has been argued, as it does not affirmatively appear, that this appeal was upon payment of costs and giving bond for the eventual condemnation money, the appeal was properly dismissed on that ground. It would hardly be fair to sustain this dismissal on that ground; no such point was made in the Court below. Perhaps had this ground been insisted on, it might have been possible for the appellant to perfect the record, by satisfying the cost had been paid and bond given. But we are sure this was necessary. The statute says the appeal is left at the discretion of the Judge. The very nature of such a collateral issue being as it is only collateral to the final judgment, would seem to be outside of the reason of the law requiring costs to be paid and bond given in case of appeal. The appeal is provided for in lieu of a new trial, which is the course such issues take in the Superior Court.

Judgment reversed.

JOSHUA HILL *et al.*, plaintiffs in error, *vs.* WILLIAM ALFORD, next friend, defendant in error.

1. Where there is no ambiguity on the face of a will, parol evidence is inadmissible to explain it. (R.)
2. Where a will provided that, as testator's children should marry or come of age, the executor should give off such portions of the property as he thought proper, the title to the same remaining in the estate until the youngest child should marry or come of age, when it should be brought into the general fund and a final division take place, and in case all the children should die without leaving children at the time of their death, then the property to pass to the Inferior Court of Putnam county, for certain specified purposes, and the youngest having survived all the children, and having been placed in possession of the entire estate, and having died after he arrived at full age, leaving two children :

Held, That the purchasers, under an execution against said youngest child, obtain a valid title thereto as against his children. (R.)

Will. Ambiguity. Parol evidence. Remainder. Before Judge ROBINSON. Morgan Superior Court. September Term, 871.

For the facts of this case, see the decision.

REESE & REESE; FOSTER & FOSTER, for plaintiffs in error. 1st. The first error complained of is the admission of the testimony of witnesses, Branham and Ogilby : See Code, ss. 2420, 2421, 3747 ; Doyal and wife *vs.* Smith, ex'r, 28 n., 262. No ambiguity in this will, either latent or patent : Greenleaf's Evidence, 297, 300 ; 1 Burrill's Dict., 90 ; Bilgslaw, adm'r, *vs.* W. B. Moore, (2 and 3 head notes,) 14 L., 370. 2d. The second error complained of is the charge of the Court, " that the plaintiffs, the children of Andrew F. Bird, at the death of Andrew F. Bird, under the last will and testament of George L. Bird, took an estate in remainder in the property in dispute." 1. They cannot take by implication : Jarman on Wills, 466 ; Wilkerson *vs.* Adams, 1 Veech & Beaums., 466, (marg. p. ;) Wright *vs.* Hicks, 12 Ga., 3, (head notes, 7, 8, 9.) 2. Nor can they take under the terms of will ; the law favors the vesting of estates : Jarman

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on Wills, 726; 16 Ga., 345; 20 Ga., 834; 33 Ga., 341; 3 Kelly, 356; 14 Ga., 232. 3d. There is no difficulty in construing this will and arriving at the intention of testator from the will itself. Transposing clauses: Code, 2420. This will has already been construed for all the purposes of this cause by this Court: See *Cogburn vs. Ogilby*, adm'r, 18 Ga., 56. "A patent ambiguity is one which appears on the face of the instrument itself, and renders it ambiguous and unintelligible: as if, in a will, there was a blank left for the devisee's name." *Brown's Maxims*, 261 and 468; *Smith on Contracts*, 28; *Bacon's Maxims*, 90. "A latent ambiguity is thus: If I grant my manor of S. to J. F. and his heirs, here appeareth no ambiguity at all; but if the truth be that I have the manors both of South S. and North S., this ambiguity is matter in fact, and, therefore, it shall be holpen by averment whether of them was that the party intended should pass." 1 *Powell on Devises*, 477; 2 *Kent Com.*, 556.

J. WINGFIELD; BILLUPS & BROBSTON; L. E. BLECKLEY; NISBETS & JACKSON, for defendant. 1st. Parol evidence of the circumstances and surroundings of testator admissible: Code, sec. 2421; 12th Ga. R., 47; 31st *Ib.*, 198; 14th *Ib.*, 370; 17th *Ib.*, 267; 1st *Greenleaf's Ev.*, 410; 1st *Jarman on Wills*, 363; *Blackstone's Coms.*, book 2d, 513; 6th *Vesey R.*, 32; 7th *Ib.*, 518. 2d. In construction, transposition of sentences, etc., allowed: Code, sec. 2420; 1st *Jarman on Wills*, 538, 317; 24th Ga. R., 102. 3d. By will of George L. B. the fee never was intended to vest: 2d *Red. on Wills*, 34; 1st *Jarman on Wills*, 500; 29th Ga. R., 545. 4th. Subsequent restrictive clause controls: 1st *Jarman on Wills*, 41; 6th *Peters' R.*, 76; 30th Ga. R., 461; 24th *Ib.*, 102. 5th. Rules of construction: 1st *Red. on Wills*, 432 *et seq.*; 2d *Jarman on Wills*, 742 *et seq.*

WARNER, Chief Justice.

This was an action of ejectment brought by the plaintiff against the defendant, to recover the possession of a tract

land in the county of Morgan. On the trial of the case, the jury found a verdict for the plaintiff. The defendants made a motion for a new trial, on the ground that the verdict was contrary to law and the evidence, and because the Court erred in admitting in evidence the sayings of Bird, the testator, (under whose will the plaintiff claimed title,) before and after making the will, and because the Court erred in charging the jury that the children of Andrew F. Bird, the lessors of the plaintiff, took an estate in remainder in fee, under the will of George L. Bird, to the property in dispute. The motion for a new trial was overruled, and the defendants excepted.

The following is a copy of the last will and testament of George L. Bird, as set forth in the record :

"Item 1st. I will and desire that all my property, both real and personal, should be kept together under the management and control of my executor, to be hereinafter named, for the support and education of my family.

"Item 2d. I will and desire to give my executor the privilege of selling such part of my estate as may seem best to him, either for the payment of my debts or for the better management of my estate.

"Item 3d. Should my wife, Phœbe, marry, it is my will that my estate shall furnish her with a genteel and comfortable support out of my property during her life.

"Item 4th. It is my will, that should any of my children be after marriage and without leaving any child or children born of said marriage living at the time of said child's death, then that the widow of such child shall receive \$500 from my estate, and no more.

"Item 5th. It is my will, that as my children should marry and become of age, my executor shall give off to such child such portion of my estate as he may think best, for the purpose of managing and controlling and deriving the profits or income to himself; but the title to such property shall not be vested from my estate, nor such child acquire any title to the same; but said property shall belong to my estate until

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the youngest child shall marry or become of age, and then shall be brought into the general fund, to be divided among all my children equally, share and share alike.

"Item 6th. My further will and desire is, that should all my children die, without leaving children at the time of their death, that all my property shall be made a poor school fund of, to be placed under the control of the 'Inferior Court of Putnam county,' and my executor, or such other person as my executor may select as his adviser, to be appropriated to the purposes in said county of Putnam as the poor school fund is applied.

"I constitute William B. Carter my executor, to carry into effect this, my last will and testament, hereby revoking all others. This day of April, 1838."

There is no ambiguity on the face of the testator's will, which would authorize the introduction of parol evidence to explain it; but the words thereof are to be construed according to their legal effect, and the intention of the testator must be derived from the plain, unambiguous words which he has employed in making his will. It was error, therefore, in the Court in allowing the parol evidence of the sayings of the testator to be given in evidence as set forth in the record. The following facts were in evidence at the trial: George L. Bird, the testator, died two or three weeks after making his will, leaving as his only children three sons, two of whom died before Andrew, the youngest, became of age or married, leaving no children. Andrew, the youngest, and last survivor, died after he arrived at full age, leaving two children, who are the lessors of the plaintiff in this suit. After Andrew became twenty-one years of age, the administrator with the will annexed of George L. Bird, turned over to him the entire estate of the testator. The land in dispute was levied on and sold by the sheriff as the property of Andrew F. Bird, and purchased by the defendants; and the question is, what estate did Andrew F. Bird take under his father's will, and did the lessors of the plaintiff take any interest in the land under that will? This will must be

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d under the law as it stood prior to the adoption of the will. The Court charged the jury, "that the plaintiffs, children of Andrew F. Bird, under the will of George Bird, took an estate in remainder in fee, in the property in dispute." If there are any words in the testator's will, which, according to the legal rules of construction, would create an estate in remainder in fee in the children of Andrew F. Bird, to the property in dispute, or any other estate not in them, it has escaped our observation. What estate did Andrew F. Bird take under the will to the property in dispute? The title to the property was in the executor for the purposes specified in the will, until Andrew, the youngest child, became of age, and then it was to be divided among all testator's children equally, share and share alike. When Andrew became of age he was the only surviving child, and the entire estate vested in him in fee subject to be divested by the sixth item of the will, in the event he should die without leaving children at the time of his death. The effect of Andrew in the land under the will was not contingent upon his leaving children, as has been supposed, but was a vested fee, subject to be divested in the event he died without children. In the event he died without children, the property went over by way of an executory devise to the Inferior Court of Putnam county, as a poor school fund; this executory devise was not at all inconsistent with the fact that the property being in Andrew, for an executory devise may be limited after a fee. The fee which Andrew took in the land under the will was a qualified or base fee, because it was a qualification annexed thereto, (to-wit,) that if he died without children it was to go over by way of executory devise to the Inferior Court of Putnam county; still, it was an estate in fee in him, because, by possibility it might endure forever to him and his heirs, as it turned out in this case, he did leave children at the time of his death. The property being a qualified or base fee has the same rights and privileges as an estate in fee simple till the contingency upon which it is limited occurs, as if he was tenant in fee simple: 2 Blackstone's Com-

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entaries, 109-10 (and note 15). If there should be any doubt whether the devisee in this case took an absolute estate in the land at common law, there can be none under the provision of the Act of 1821, which declares that all devises of real property shall vest in the person to whom the same are made an absolute, unconditional fee simple estate, unless it be otherwise expressed, and a less estate mentioned and limited in such devise.

It was said, on the argument, that it was the intention of the testator that his grandchildren should take his property in the event his sons died leaving children, but there are no words in the testator's will which will authorize a Court to say so; for, as it was said by this Court in *Wright vs. Hill* 12 *Georgia Reports*, 156, "Courts are not permitted to give effect to the will of a testator contrary to the plain and obvious terms used by him upon a mere conjecture as to his intention." What estate in the land the defendants would have taken under their purchase at sheriff's sale, if Andrew F. had died without children, as against the executory devise, it is not necessary now to say, inasmuch as the executory devise over was defeated by Andrew F. leaving children at the time of his death. In our judgment, Andrew F. Bird being the youngest and only surviving child of the testator when he became twenty-one years of age, he took a vested fee in the land, subject to be divested on his dying without children, but as he did not die without children, his title to the land was not divested, but on his death descended to his heirs, subject to the payment of his debts, and that, inasmuch as Andrew had a good, indefeasible estate in the land, the defendants who purchased it at sheriff's sale as his property acquired a good and valid title thereto as against the plaintiffs, who could only claim it as the heirs-at-law of the father, Andrew F., and not as remaindermen, under the will of their grandfather, George L. Bird.

Let the judgment of the Court below be reversed.

ISON NICHOLS, plaintiff in error, vs. MARGARET J. HAMPTON, defendant in error.

per containing all the requisites of a mortgage of personal property is a mortgage from the date of its execution, even though it be tested by an officer.

sufficient if it be proven by the subscribing witness and recorded within three months from its execution.

per, providing for a lien on a "bay mare," and showing that the same was purchased by the mortgagor from the mortgagee, is a sufficient description of the property mortgaged.

not necessary that a Notary Public shall affix his seal to the proof of a deed by a subscribing witness.

mortgage recorded within three months from the date of its execution is a lien from its date, even against *bona fide* purchasers without notice.

affidavit, probating a mortgage, taken before the attorney of the party, who is a Notary Public, is not a legal affidavit, and a mortgage recorded on such probate is not legally recorded.

real mortgage. Attestation. Probate. Description. Notice. Affidavit. Attorney and client. Before J. STROZIER. Worth Superior Court. April 10th, 1872.

January 18th, 1870, Charles Johnson made the following instrument:

10. By the first day of February next, I promise to give to Margaret J. Hampton, or bearer, two hundred dollars which I have received in a bay mare and buggy, Margaret J. Hampton holding a lien on said horse and buggy until it is

(Signed)

"CARLES JOHNSON.

W. F. LEHMAN.

Notary, Georgia, January 18th, 1870."

The instrument, of similar character, was executed by the same maker, on the same day, for the sum of \$150, due on the 1st of March next thereafter.

These instruments were admitted to record on the following day, March 2d, 1870:

21.

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"GEORGIA—DOUGHERTY COUNTY:

"Before me, the subscriber, personally came Fred Lehman, who, on oath, says that he saw Carles Johnson sign and deliver the within notes as therein stated, and that deponent was a witness to the same, and has so signed them.

"FRED LEHMAN.

"Sworn to and subscribed before me
this March 2d, 1870.

(Signed) "L. D. P. WARREN, N. P."

On March 3d, 1870, S. S. Yopp made the following affidavit, based upon the foregoing instruments:

"GEORGIA—DOUGHERTY COUNTY:

"Before me, the subscriber, personally came Sidney S. Yopp, agent for Margaret J. Hampton, who, on oath, says that Carles Johnson, of Worth county, is due the said Hampton, on the annexed mortgage, the sum of \$350, principal, and \$1 50, interest, and this affidavit is made to obtain the foreclosure of said mortgage. (Signed)

"S. S. YOPP.

"Sworn to and subscribed before me this
March 3d, 1870.

(Signed) "W. H. WILDER, Ordinary."

The order of foreclosure was passed on the same day that the foregoing affidavit was made, and execution issued, which was duly levied on the bay mare described in the foregoing instruments. Harrison Nichols filed his claim to said property.

Upon the trial of the issue formed by the claim, the claimant moved to dismiss the levy upon the following grounds to-wit:

1st. Because the paper, pretending to be the mortgage, plaintiff in *fi. fa.*, was not witnessed by any officer authorized to attest the same.

2d. Because the probate of said instrument was made before a Notary Public, who was one of the attorneys for plaintiff in *fi. fa.*

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3d. Because the paper, if properly attested, was not a mortgage.

4th. Because S. S. Yopp, who made the affidavit foreclosing the mortgage, does not swear he is agent for plaintiff, or show other authority of agency to foreclose the same.

The motion was overruled by the Court, and claimant excepted.

The plaintiff in *fi. fa.* introduced the mortgage, the affidavit and order of foreclosure, and identified by G. J. Wright the mare levied on.

The claimant testified that he bought the mare from Charles Johnson a month before he knew of the plaintiff's claim; but he knew nothing of any claim against the mare at the time he bought her; that the levy on the mare was made on the 4th of March, 1870.

The Court charged the jury as follows, to-wit: "That if the defendant in *fi. fa.* made and executed, in the presence of a witness, the paper read to you as a mortgage on the mare claimed, on the 18th of January, 1870, and that said witness did, before a Notary Public, (and that Notary Public is one of the attorneys for plaintiff,) on the 2d day of March, 1870, prove the execution of said paper, and the same was put on record within three months from the date of the signing, that although claimant may have purchased the horse without notice of the lien, and, one month before, the same was proven before the Notary Public, and, although the Notary Public's signature was not attested by a seal, yet, the jury should find the horse subject."

The jury found the mare subject to plaintiff's execution, and claimant excepted to the refusal of the Court to dismiss the levy, and to the charge of the Court, as given, and assigns the same as error.

D. H. POPE, for plaintiff in error.

WRIGHT & WARREN, for defendant. The instrument is a mortgage, and was properly probated and foreclosed: Irwin's Code, sec. 1945 *et seq.*; 39 Ga. R., 312.

McCAY, Judge.

It must be admitted that these papers fail to fill the common law idea of a mortgage. They are not under seal; they contain no words of conveyance, and are painfully meagre in their description, not only of the debt intended to be secured, but of the property in which the lien is intended to be created. But our Code requires no specified form to constitute a mortgage. It conveys no title, and it is not required to be under seal. It is sufficient if it specifies the property, state the debt and show that the parties intend to create a lien: Revised Code, section 1945. Taking these papers together, they show pretty plainly that the debt intended to be secured is \$350, as the papers specify; that a bay mare was (so far as this issue is concerned) the property, and that the parties intended to create a lien for that amount upon the bay mare. True, the description will apply to any bay mare, but there is another description added, to-wit: the bay mare sold by the plaintiff to Johnson. Description of property depends a good deal upon its nature, and perhaps this description of the mare is sufficient to put any one who should read the paper upon notice. It is contended that no paper can be a mortgage under our Code until it is properly probated, and, perhaps, recorded. The language of the Revised Code, section 1945, gives much color to this idea. The words are, "it *must* be executed in presence of or proven, before a Notary Public, etc., and be recorded within three months." But other sections of the same chapter imply very clearly that it was not intended to change the old law. Section 1947 provides that any mortgage, not recorded in time, shall take lien from the date of the record. Section 1949 provides that a mortgage not recorded in time, or irregularly recorded, shall not be a lien against purchasers without actual notice. From this it seems clear that if the mortgage be recorded in time, it takes lien from its date. And this was the old law Cobb's Digest. The Act of 1866, Code, 1509, provides that a Notary need not affix his seal to his attestation of a deed

True, the taking of the probate of a deed is not exactly its attestation, but it is part of it—stands in the place of it, and comes within the spirit of this provision of the Act of 1866.

We are clear that, under the decision of this Court in the case of *Willowski vs. Hall*, 37 Georgia, 678, this affidavit of probate, if taken, as was contended, before the plaintiff's attorney, was not a legal probate. The Court, in that case, decides that section 443, Irwin's Revised Code, prohibits an attorney, who is a Notary, from administering any oath required by law of his client, and Judge Walker, in his opinion, after an elaborate examination of the authorities, shows that, by the practice of the English Courts, both of law and chancery, affidavits taken before the attorney of the party producing them are improperly taken. We think the rule founded on a sound public policy. The subsequent Act of March 8th, 1869, does not alter the law; it only cures defects in cases which had at that time occurred, and by this very Act, the Legislature would seem to intend that the practice was not only illegal in the past, but that it was intended it should remain illegal.

Under the proof, the claimant would seem to be an innocent purchaser. The mortgagee has no natural equity in her favor. She must stand on her strict legal rights. To get her lien good against the right of the claimant, who brought before record and without notice, she must bring herself within the precise letter of the law. This she has failed to do, if the proof shows her mortgage was not properly given, and, therefore, not properly recorded in three months. The Court should have so charged the jury, and if the proof showed them that the probate was before the plaintiff's attorney, the claimant should have had the verdict. The judgment reversed.

Kenan vs. DuBignon et al.

SPALDING KENAN, executor, plaintiff in error, *vs.* CHARLES DUBIGNON *et al.*, administrators, defendants in error.

1. Where a suit is brought by administrators against an attorney for money collected by him as their attorney, and not as an attorney for their intestate, the allegation in the pleadings of their representative character is mere surplusage, as they were entitled to maintain the action in their own names. (R.)
2. Suit being brought by administrators, proof of their representative character is unnecessary, unless denied by plea. (R.)

Pleading. Administrators. Tried before Judge ROBINSON. Baldwin Superior Court. February Term, 1872.

Charles DuBignon and David J. Bailey, as administrators of Seaton Grantland, deceased, brought complaint against Spalding Kenan, as executor of Augustus H. Kenan, deceased, for \$3,326 37, alleged to have been collected by said testator as attorney at law for plaintiffs, and for which he had failed to account.

The defendant pleaded the general issue, and set-off to the amount of \$2,000 for fees due to defendant's testator for professional services rendered to plaintiffs.

Upon the trial, plaintiffs tendered in evidence a certified copy of the order of the Court of Ordinary for the county of Baldwin, dated May 7th, 1866, appointing Charles DuBignon and David J. Bailey, administrators, with the will annexed, upon the estate of Seaton Grantland, deceased, "upon their entering into bond for the sum of \$600,000."

Also, a paper purporting to be letters of administration, with the will annexed, of Seaton Grantland, deceased, naming Charles DuBignon and David J. Bailey as such administrators, dated May 7th, 1866. The paper recited that said DuBignon and Bailey had given bond.

The defendant objected to both of said papers, upon the ground that they showed a grant of administration to the plaintiffs, with the will annexed, of Seaton Grantland, upon the personal bond of the plaintiffs, without security, as required by positive law, and did not, in themselves, show

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any right or jurisdiction in the Ordinary to grant administration without bond and security in double the amount of the estate. The objection was overruled by the Court and defendant excepted.

Evidence was introduced as to the indebtedness of defendant's testator to plaintiffs, unnecessary here to be set forth.

The plaintiffs having closed, defendant moved for a non-suit, on the ground that there had been no evidence introduced to show plaintiffs to be the lawful administrators, with the will annexed, of Seaton Grantland, deceased. The motion was overruled and defendant excepted.

The jury returned a verdict for the plaintiffs for \$2,893 74. The defendant moved for a new trial, upon the following grounds, to-wit:

1st. Because the Court erred in overruling the motion for non-suit.

2d. Because the verdict was contrary to evidence.

The defendant made no objection as to the verdict of the jury, provided the plaintiffs be held on their foregoing evidence to be lawful and valid administrators with the will annexed.

The motion for a new trial was overruled by the Court and defendant excepted, and assigns error upon each of the ~~fore~~said rulings.

WILLIAM MCKINLEY, for plaintiff in error. 1st. The certified copy of the order and the letters appointing plaintiffs administrators, with the will annexed, were admitted without evidence of the probate of a will: 2 Greenleaf's Ev., sec. 39; 1 *Id.*, sec. 518; 1 Jarm. on Wills, 214; 1 Williams Ex'rs, 239, 280; 2 *Id.*, 1342; 2 Selw. N. P., 597; 2 Ga. 120; 4 T. R., 260; Fonb. Eq., B. IV., pt. 2, chap. 1, § 2. 2d. Said letters and order show on their face that they were granted without security: 2 Greenl. Ev., sec. 339; *Id.*, secs. 2397, 2412, 2466.

CRAWFORD & WILLIAMSON, for defendants. 1st. Plaintiffs may sue in individual or representative character: 16

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Ga. R., 190; 18 *Ib.*, 679; 2 Williams on Ex'rs, 1595. 2d. The general issue admits the character used: 4. Har. R., 299; 4 Gill. R., 166; 3 Strobb. R., 484; 11 Humphries R., 556; 31 Maine 503; 2 Greenl. Ev., 338. 3d. Probate of will need not be proven: 4 Ga. R., 148; 2 Greenl. Ev., 339; 1 Williams on Ex'rs 450. 4th. The Act of 1866, dispensing with security is still in operation: Const. 1868, Art XI., sec. 3. Vested rights reserved: Const. 1868, Art XI., sec. 5.

WARNER, Chief Justice.

It appears from the record in this case that the plaintiffs brought their action as administrators of the estate of Seaton Grantland, deceased, against the defendant as executor of A. H. Kenan, deceased, for the sum of \$3,326 37, for money collected by defendant's testator as an attorney for the plaintiffs, and not as an attorney of their intestate. To this action the defendant filed two pleas, the general issue and plea of set-off, in which latter plea the defendant alleges that the plaintiffs, as administrators as aforesaid, before and at the commencement of their said action, were indebted to him as executor the sum of \$2,000, etc. On the trial of the case, the plaintiffs offered in evidence their letters of administration, and the order of the Court of Ordinary, from which it appeared that the plaintiffs were administrators with the will annexed of Seaton Grantland. The defendant objected to the introduction of this evidence upon several grounds, which objections were overruled, and the papers read in evidence. The defendant then made a motion to non-suit the plaintiffs, on the ground that the evidence offered by them to show that they were the lawful administrators with the will annexed of Seaton Grantland, did not show that fact, but on the contrary, showed they were not the lawful administrators. The motion for non-suit was overruled by the Court.

After hearing the other evidence in the case, and under the charge of the Court, the jury found a verdict for the plaintiffs. A motion was made for a new trial, on the ground that the Court erred in overruling the defendants' motion for

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and on the further ground that the verdict, being of the plaintiffs in their alleged pretended capacity administrators, with the will annexed of Seaton l, deceased, is a verdict against evidence and without. The Court overruled the motion for a new trial excepted. In our judgment, the motion was properly overruled. The plaintiffs led to maintain the action in their own names, without themselves as administrators, and if they did sue in the capacity of administrators, it was not necessary for them to prove their authority to sue in that capacity at the trial, when the defendant had pleaded to the merits of the action, and pleaded a set-off against them in the capacity in which they sued as administrators, without their authority, in his plea, to sue in that capacity. The plaintiffs undertook to do more than they were permitted to do at the trial, did not prejudice the defendant's rights in any of his rights, so far as we can perceive. The judgment is right, under the admission made in the record as to the competency of the defendant's testator to the plaintiff. There was no error in the Court in refusing to dis-

judgment of the Court below be affirmed.

CLARK & COMPANY, plaintiffs in error, vs.
 FRANCIS L. NEUFVILLE, defendant in error.

There is a sale of goods, with a warranty of quality, and a disclaimer of acceptance by the buyer, and the goods prove not to correspond to the warranty, and there is no fraud by the seller, the measure of damages is the difference between the price paid and the value of the goods as they actually were at the time and place of the sale, together with such consequential damages, if any there be, within the rule, excluding indirect and speculative damages.

There is no rescission, by the buyer, of a contract in a case of the

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sale and delivery of goods, unless the buyer return or offer to return the goods, and if, by his own act, as by a sale of a portion of the goods, he render such delivery impossible, the buyer cannot, of his own motion, rescind.

Sale. Warranty. Measure of damages. Rescission.
 before Judge GIBSON. Richmond Superior Court. Jan Term, 1872.

Francis L. Neufville brought assumpsit against John Clark & Company for \$5,000 damages, sustained by plaintiff on account of the failure of defendants to deliver seven hundred and four bags of clay peas, containing one thousand three hundred and seventy-eight bushels, of the same quality as the samples exhibited to plaintiff at the time the purchase was made. Plaintiff alleged that he purchased said clay peas for the New Orleans market; that he communicated this to the defendants at the time of the purchase, and that the peas delivered were wholly unsuitable for said market. Defendants pleaded non-assumpsit.

The evidence disclosed the following facts: In March 1871, defendants had in a warehouse in Atlanta seven hundred and four sacks of peas. M. Hyams, acting as agent for the plaintiff, was desirous of purchasing a quantity of peas of a variety known as "clay peas." He was informed by defendants that six hundred and fifty-three sacks of their peas at Atlanta were of that variety, and fifty-one sacks were mixed peas. Samples were exhibited to him. Plaintiff did not want the latter, but as defendants declined to divide the lot, he took them all at \$2 35 per bushel. The plaintiff did not examine the peas, but bought by sample, the defendants guaranteeing that the bulk should be of the same quality. By the contract, the defendants were to deliver the peas on board the cars in Atlanta, consigned to Dupree, Rice & Company, New Orleans, and upon the delivery of railroad receipts, as in good order, the plaintiff was to pay the price, all of which was done. On the 17th, 19th and 20th of March, the peas arrived in New Orleans, less forty bu

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transportation, for which \$2 80 per bushel was paid ilroad, and on the 21st of March, twenty-eight sacks l for \$3 25. A short time after their arrival, plainved letters stating that the peas did not correspond samples, and on March 23d, 1871, he called on the ts and so stated. The plaintiff testifies that the detold him to have the peas examined and the matter set right. On this point the evidence is conflicting. 9th of March, a survey was held by persons selected nsignors, and the result declared to be that one hundninty-eight sacks were up to the sample; that the mixed, and that the sacks containing them were not able. On the 3d of April, the plaintiff called on dants and told them that the peas were subject to er. On the 7th of April, the plaintiff sent a letter ants, saying that unless a satisfactory arrangement e by the morrow, the peas would be sold at their e defendants declining to act, the peas were sold as On the 20th of April, one hundred and seventy y peas, at \$1 90. On the 20th of April, three hundeleven sacks, mixed peas, at \$1 75. On the 22d of e hundred and ninety-five sacks, mixed peas, at These amounts, with the twenty-eight sacks previ l on the 21st of March, made the seven hundred sacks. The plaintiff introduced witnesses who exhe peas in New Orleans and testified that the mahe sacks were not clay peas. The defendants proved mes who had examined the peas in Atlanta that six and fifty-three sacks were clay peas. Samples were to the jury.

urt charged the jury as follows, to-wit: "That if the nured by the defendant, to plaintiffs in Atlanta, were of peas which plaintiffs contracted to buy, then they ul for defendant, that being a compliance with the but that if they should find that the peas so deAtlanta, were not the kind which plaintiffs had to buy, then the measure of plaintiffs' damages

Clark & Company vs. Neufville.

would be, the difference between the price paid for the peas by plaintiffs and the price for which the peas were sold in New Orleans, adding to said difference all proper expenses incurred by plaintiffs, such as freight, inspection, etc., and also interest."

In accordance with said charge, the jury rendered a verdict for the plaintiffs, for \$1,651 12. Whereupon the defendant moved for a new trial, upon the ground that the Court erred in the aforesaid charge. The motion was overruled and defendants excepted, and now assign said ruling as error.

W. H. HULL; J. C. C. BLACK, for plaintiffs in error. 1st. Damages on breach of warranty: 1 Ga. R., 591; 22 *Ib.*, 274; 23 *Ib.*, 17; 26 *Ib.*, 704; 30 *Ib.*, 418. Consequential damages not too remote may be added: Sedg. on Dam., 280. Rule same in case of misrepresentation: 30 Ga. R., 950. 2d. The rule of damages laid down by the Court can only be sustained in cases of rescission: 24 Ga. R., 441; 25 *Ib.*, 712; Sedg. on Dam., 296. 3d. Right to rescind exists when: Code, secs. 2610, 3117; 22 E. C. L. R., 196; 70 *Ib.*, 526; Smith's Mer. Law, 634; Ad. on Con., 272. 4th. There can be no rescission in part: Code, sec. 2809; 2 Pars. on Con., 679; 20 How. R., 154; 8 Greenleaf's R., 30.

BARNES & CUMMING, for defendant. 1st. The rights of the parties upon a breach of warranty are to be fixed with reference to New Orleans: Benj. on Sales, 665-671. 2d. There was a legal fraud upon the part of the sellers: Benj. on Sales, 337-345; Code, secs. 2592, 3117; 36 Ga. R., 648. 3d. Distinction between breach of warranty and non-performance of contract: Benj. on sales, 443-450; 10 Ex. R., 191; 5 B. & Ald., 250; 18 Q. B., 560; 17 C. R., 619.

McCAY, Judge.

These peas were sold with a warranty, delivered according to the agreement, accepted and paid for. There is no pretence of fraud; the defendants below supposed the peas were

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as described. There has, without doubt, been a breach of the warranty, and the plaintiff was entitled to a verdict. The only question is, what is the proper and legal measure of damages? The Court charged the jury, in substance, that the price paid and expenses, less what the peas sold for, was the true criterion. In other words, the Judge told the jury that if there was a breach of warranty, the peas, when the fact was discovered and notice given, were at the defendant's risk, and, as he did not take them away, they were properly sold on his account, and, being due to the plaintiff the price of the peas and the expenses of their transportation, he was entitled to a credit.

Our Code, section 2610, says, "a breach of warranty, express or implied, *does not annul the sale*, if executed, but gives the purchaser a right to damages." If this be so, these peas were not at the risk of the defendant at any time after they were delivered, accepted and paid for. It was not in his power of the plaintiff to make them the defendant's property again and sell them at his risk. The *breach of the warranty* did not annul the sale. The plaintiff had, on the breach, a right to an action for the damages done him at the sale. He had no right to cast upon the defendant the loss caused by the fall of peas in the market, and that was no element in the wrong done him by the defendant. And, under the evidence in this case, that, under the charge of the Court, was a material matter.

The measure of damages on the breach of warranty in an executed contract, is the difference between the price paid and the real value of the article at the time and place of sale. This is the rule adopted by this Court: 1 *Kelly*, 591; 23 *id.*, 17; 26 *Ga.*, 704; 30 *Ga.*, 948; and this is the common law. Lord Tenderden, in 2 B. and Ad., 461, says: "Where property in the specific chattel has passed to the vendee and the price has been paid, he has no right, on the breach of warranty, to return the article sold, revest the property in the vendor and recover the price. He must sell on the warranty, unless there has been a condition in the contract

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providing for a return:" *Strut vs. Blay*, 2d B. and 461.

If there be fraud in the sale the rule is different. sale is void, and the vendee has a right on discovery of fraud to rescind: *Sedgwick on Damages*, 280. But an offer to rescind is not enough. The plaintiff must put, or offer to put, the vendee in the situation in which he found him. He must be able to rescind, that is, redeliver to the vendee: *2809*, 20 *Howard*, 154. We will not say that the difference between the price paid, and the value of the unsound stock at the time and place of sale, is the only damages that can be recovered. That is the measure of the direct damages. But if there be also indirect damages, growing directly out of the transaction, capable of computation with reasonable certainty, they may also be recovered: See *Code* 2893—*Sedgwick on Damages*, 280. We think, therefore, that the Judge was wrong; the Judge's charge is only correct in a case of rescission. This was not, and could not, under the evidence, be such a case.

Judgment reversed.

JAMES H. PORTER *et al.*, executors, plaintiffs in error.
ELIZA KOLB, guardian, defendant in error.

This Court will only interfere with the verdict of a jury when there is not sufficient evidence under the law to authorize the verdict, and when it is manifestly wrong in finding everything to be true as proved. (R.)

New trial. Verdict. Before Judge ROBINSON. *M*
Superior Court. March Term, 1872.

For the facts of this case, see the decision.

A. G. & F. C. FOSTER; JOSHUA HILL, for plaintiff in error.

BILLUPS & BROBSTON, for defendant.

BNER, Chief Justice.

It was an action brought by the plaintiff against the defendants, on an account for services rendered to the defendant's testatrix. On the trial of the case the jury found a verdict for the plaintiff for the sum of \$1,000. A motion was made for a new trial, on the grounds that the verdict was contrary to the charge of the Court, without evidence, and against the weight of the evidence. The Court overruled the motion and the defendants excepted. The defense set up by the defendants to the plaintiff's action was that their testatrix, through kindness, permitted the plaintiff to remain at her house for her own benefit and comfort only agreeing to furnish her with clothing, pocket money and pay her tuition and doctor's bills, without any intention that the plaintiff should make any charge for her services rendered to the defendants' testatrix. The services rendered by the plaintiff to the testatrix of defendants was proved, by at least two witnesses, (Mrs. Barnett and Camp) from June, 1865, up to June, 1869. Mrs. Barnett testified that her services were worth \$60,00 per month, and in detail the services performed. Camp also proves the performance of services by the plaintiff, and that the testatrix promised to remunerate her therefor without specifying any definite amount; thinks her services to the testatrix were worth \$400 or \$500 per annum.

The evidence for the defendants in relation to some of the facts is in conflict with that of the plaintiff. The Court told the jury, in relation to this point in the case, "that where there is a conflict in the testimony, it is the duty of the Court to reconcile such conflict, if possible, but when it is impossible, that witness who had the best opportunity of knowing the things being equal, is entitled to most credit." The Court said, because the jury found for the plaintiff, they were contrary to the charge of the Court. The witnesses had the best opportunity to know the facts, and who was entitled to the most credit, was a question exclusively

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for the jury to decide, and not the Court, and it does not follow that, because the jury, under the evidence, thought proper to give the most credit to the plaintiff's witnesses, that the verdict is contrary to the charge of the Court, but, on the contrary, is entirely consistent with it. There can be no pretence in this case that there is not sufficient evidence in the record to support the verdict, if the jury believed the plaintiff's witnesses. The question is not whether this Court would have rendered a verdict for the plaintiff, had we been in the jury box, but the question is whether there is sufficient evidence in the record to support the verdict which the jury have found in the exercise of their undoubted jurisdiction and authority under the law? The distinction which will authorize the Courts to interfere with the verdicts of juries, and when not allowed to interfere with them, is this: when there is not sufficient evidence, under the law, to authorize the verdict, assuming everything to be true as proved, then the Courts will interfere and set it aside, or in extraordinary cases, the presiding Judge may exercise a sound discretion and grant a new trial, when the verdict is decidedly and strongly against the weight of the evidence; but when there is sufficient evidence to support the verdict, although that evidence may be conflicting, the Courts have no legal power to interfere with and set aside the verdict, the more especially this Court, which is, alone, a Court for the correction of errors from the Superior and City Courts. This Court is not, and never was intended to be, a tribunal to decide questions of fact, which, under the law, are required to be decided by the jury of the vicinage, and it is quite time that parties and their counsel, in view of the repeated rulings of this Court, should so understand it. According to the rule established by the numerous decisions heretofore made and reported, there is no good legal pretext for bringing this case before this Court on the statement of facts contained in the record, and thus laying the plaintiff in the collection of her demand, awarded to her by the verdict of the jury, which the Court below refused to set aside. We therefore affirm the judgment of the

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Court below, and award ten per cent. damages, as provided by the 4221st section of the Code.

Judgment affirmed.

TOLOMEY JOHNSON *alias* TOLOMEY ROGERS, plaintiff in error *vs.* THE STATE OF GEORGIA, defendant in error.

1. When, on the trial of an indictment for an assault with intent to murder, it was discovered, after the argument to the jury had been begun, that there was a variance between the proof and the indictment as to the name of the person charged to have been assaulted, it was not error in the Court to permit the State to call witnesses to prove that the person named was known as well by the name mentioned in the indictment as by that mentioned in the proof.
2. It is competent for the State to show on the trial of an indictment for assault with intent to murder, that the person assaulted was known by the name mentioned by the indictment, and also by another name, even though the indictment does not allege that he was known by the two names. It is a matter of description and does not stand on the footing of a misnomer of the defendant.

Criminal law. Assault with intent to murder. Misnomer.

Practice. Before Judge HARVEY. Floyd Superior Court. January Term, 1872.

Tolomey Johnson *alias* Tolomey Rogers was placed upon trial for an assault with intent to commit murder, alleged to have been made upon the person of one Steve Davenport, on December 1st, 1871. The defendant pleaded not guilty.

The prosecutor, upon his first examination, testified that his name was Steve Debero. After the evidence was closed, counsel for defendant took the position that a conviction could not be had, on account of the variance between the indictment and the proof, as regards the person alleged to have been assaulted. The Court remarked that he despised technicalities, and for his part wished that they were all done away with; that he would allow the Solicitor General to prove, if he could, that the prosecutor was as well known by the name

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of Steve Davenport, as by that of Steve Debero. The prosecutor, having heard all that passed, was recalled and testified that his name was Steve Debero, and so he was known and called down the country about Milledgeville, but was called up there, Steve Davenport, Big Steve, and Ben. He was corroborated by another witness as to these facts.

The jury found the defendant guilty. A motion was made in arrest of judgment, because the indictment charged the assault with intent to murder to have been made upon Steve Davenport, when the evidence shows it to have been committed upon Steve Debero. The motion was overruled and defendant excepted.

A motion was made for a new trial upon the following grounds, to-wit:

1st. Because the Court erred in admitting evidence to show that Steve Debero was as well known by the name of Steve Davenport, without any allegation in the indictment to the effect.

2d. Because the Court erred in remarking, in the presence of the jury in reference to the exception to the statement of the wrong name in the indictment, that he despised technicalities and wished that they were all done away with.

The motion was overruled and defendant excepted, and assigns error upon each of the grounds aforesaid.

UNDERWOOD & ROWELL, represented by E. N. BRYLEN for plaintiff in error. Variance as to name between indictment and proof fatal, except in case of *idem sonans*: 2 Cooley' Blac., p. 3, note 1; Roscoe's Crim. Ev., 103; 1 Bish. Crim. Pro., sec. 119; 1 Wharton's Am. Crim. Law, secs. 254, 258; 11 Ga. R., 620; 7 Blackford's R., 324.

C. D. FORSYTH, Solicitor General; R. F. FOUCHER, for the State. If the injured party was known as well by one name as the other, the identification was complete: 13 Ga. R., 98; 18 *Ib.*, 38. Not error to allow proof after the argument had begun: 16 Ga. R., 200.

McCAY, Judge.

A large discretion must be allowed to the Circuit Judge in his direction of the business before him, and we see no abuse of his discretion in permitting the State to supply this defect in its testimony. It was, as the case stood, purely formal. The identification was complete, and the proof was only to make the description of the person assaulted conform to the description in the indictment. As to the remarks of the Judge, they could have done the accused no harm. There was nothing in his case, as it finally stood, that made the remarks of the Judge pertinent to the matter before the jury. The Judge, too, took special pains to say to the jury that they were to pay no heed to them. It seems to us that to give importance to this matter, under the circumstances, is to suppose the jury to be not only very foolish, but very unworthy, and we are not disposed to do so. The only question in this case that we have felt any doubt upon, is whether the proof advanced was competent, without an allegation in the indictment that the person assaulted was known by the two or three names. After consideration, however, we are of the opinion that it was competent without the allegation. Were the variance in the *name* of the *defendant*, there are authorities that it was necessary the indictment should contain the charge that he was known by both names. But this is a mere *misdescription*, and in such cases it is not necessary. The name is only one means of identification, like the color of a horse. True, an indictment for stealing a black horse would not be supported by proof of stealing a white horse. But if the charge were for stealing a cream-colored horse, and the proof showed a dun color, the variance might be met by showing that it was sometimes called *cream* and sometimes *dun*.

Judgment affirmed.

Montgomery and West Point Railroad Company *vs.* Duer.

THE MONTGOMERY AND WEST POINT RAILROAD
 PANY, plaintiff in error, *vs.* JOHN W. DUER, Ordina
 Muscogee County, defendant in error.

In a suit against the Ordinary of a county for taxes alleged to hav
 illegally collected from the plaintiff, the declaration must set fo
 facts showing such illegality. (R.)

Demurrer. Pleading. Taxes. Before Judge JOH
 Muscogee Superior Court. May Term, 1872.

Plaintiff in error brought assumpsit against defend
 error. The only material portion of the declaration
 follows:

"For that the said county of Muscogee, on Januar
 1870, and on divers other days and times before tha
 had and received illegally, by way of taxes, to and for t
 of your petitioner, the sum of \$1,500, (a copy of wh
 hereto attached,) and afterwards, to-wit: on the day an
 aforesaid, the said county of Muscogee, by said defe
 then and there undertook and faithfully promised you
 tioner to pay to petitioner the said sum of money, whe
 defendant should be thereunto afterwards requested."

"COPY ACCOUNT.

"*County of Muscogee*

To	Montgomery and West Point Railroad Company,	
To	amount of taxes illegally collected in 1866.....	\$ 1
"	" " " " " 1867.....	17
"	" " " " " 1868.....	48
"	" " " " " 1869.....	31
		—
		\$1,03

Defendant in error demurred to the said declaration
 demurrer was sustained by the Court, and plaintiff is
 excepted and assigns said ruling as error.

BLANDFORD & THORNTON, for plaintiff in error.

HENRY L. BENNING, for defendant in error.

Wardlaw vs. McConnell.

WARNER, Chief Justice.

This was an action brought by the plaintiff against the defendant to recover the sum of \$1,033.57 for taxes *illegally* collected. The defendant demurred to the plaintiff's declaration, which demurrer was sustained, and the plaintiff excepted. It is not alleged in the declaration in what manner the taxes received were illegally collected. That the taxes were *illegally* collected and received by the defendant, is the conclusion of the pleader. The facts going to show that the taxes had been illegally collected and received by the defendant, should have been alleged, so that the Court might judge whether, under the law applicable thereto, the taxes had been *illegally* collected and received. If the facts had been alleged, the Court could have determined whether the collection of taxes was legal or illegal. It is not sufficient for the plaintiff to allege that the collection of taxes was illegal, without alleging the facts which made it illegal.

Let the judgment of the Court below be affirmed.

JOSEPH M. WARDLAW, plaintiff in error vs. MARTHA A. McCONNELL, executrix, defendant in error.

1. When a motion is made for a new trial on the ground that the Court erred in refusing to continue the cause on a showing by the party complaining that a material witness is absent, and the Judge overrules the motion, this Court will scan the showing very closely, and will not interfere unless there is a complete compliance with the rules of Court. 2. In this case the verdict is sustained by the evidence, and, under the rule so often announced, the judgment of the Court below ought to be affirmed.

Here the note sued on is alleged to have been paid by the transfer of notes and accounts, it is unnecessary to set them out in the plea of payment. (R.)

Continuance. New trial. Before Judge HARVEY. Chat-ga Superior Court. March Term, 1872.

Wardlaw vs. McConnell.

Martha A. McConnell, as executrix upon the estate of William McConnell, deceased, brought complaint against Joseph M. Wardlaw, on a note dated January 18th, 1861, due one day after the date thereof, payable to J. T. McConnell, executor, for \$726. The defendant pleaded the general issue, payment and set-off.

When the case was called for trial, defendant moved for continuance upon the following showing, to-wit: that he had ordered a subpoena for Joel K. Sanders to be served by the sheriff before last Court; that he had supposed said subpoena had been served until the last week of Walker Court, which he served nearly all the week as a juror, when he was informed by the witness that he had not received it; that defendant requested him particularly to attend Court the next week at Summerville, which he promised to do; that defendant had heard while at LaFayette Court that the subpoena had gone to the wrong place; that the witness lived in Chatooga county, was not absent by his consent or procurement and he expected to have him present by the next Court; that his testimony was material, as he expected to prove to him that plaintiff had, in the hearing of witness, when charged with suing on a note which she knew to be paid, said she was doing no more than others were doing since the war, every body took all the advantage they could. The continuance was refused and defendant excepted.

The following evidence was introduced for the plaintiff, to-wit:

1st. The note sued on.

2d. The affidavit as to the payment of taxes thereon.

3d. Martha A. McConnell sworn: Witness is a widow, her son Joseph T. McConnell had the note and was the sole executor until he was killed at the battle of Chickamauga; soon afterwards she obtained the note; supposed her son paid the taxes; last Court she had paid the taxes as directed;; that she had not paid the taxes for two years before last Court until then, because she was in doubt what she could collect the note. William McConnell left on

Wardlaw vs. McConnell.

tree of them had died since the war, leaving minor
 ven in number, interested in the note; her son
 no children; she borrowed \$600 in Confederate
 ng the late war from defendant and gave her note
 ought a piano with the money, which she has sold
 r for \$175; she was due him another note for
 money; she had told him that these credits should
 te; she believed the balance was due.
 er's Table showing Confederate money, at the
 100 was borrowed, to be worth three for one in

stiff closed.

EVIDENCE FOR DEFENDANT.

ris, sworn: Had a conversation with Joseph T.
 in Ringgold, about the note sued on and the
 less had wheat belonging to defendant for sale;
 onnell have it with the understanding that it
 be credited on the note; does not recollect how
 there was.

Pettijohn, sworn: Witness had a conversation with
 McConnell relative to a note given by defendant to
 stor for \$700 or thereabouts; that McConnell said
 about paid off in certain claims transferred to
 adant; witness had been doing the business for
 which the debts were contracted, which were
 o McConnell, and McConnell wished to know if
 reliable men; McConnell afterwards told wit-
 had collected the claims.

Witnesses were introduced by both plaintiff and
 npeaching and sustaining the witness, Pettijohn.
 returned a verdict for the plaintiff. Defendant
 new trial, among other grounds, because the
 in overruling the motion for a continuance, and
 verdict was contrary to the evidence. The mo-
 tional and defendant excepted, and assigns error
 the grounds aforesaid.

J. B. Ringgold

Wardlaw vs. McConnell.

WRIGHT & FEATHERSTON, for plaintiff in error

F. A. KIRBY, for defendant.

McCAY, Judge.

The continuance of a case is, by the statute, placed in the discretion of the Court. True, this Court will not interfere in the exercise of that discretion, and if it has been in the exercise made use of to the injury of the party losing the case, at the final hearing, this Court will interfere. Still, we will not, in the nature of the case, give every presumption to the plaintiff in favor of the Court. In this case, the showing has the effect that it does not show any subpoena to have been served, that is said is, that the defendant ordered a subpoena served. To whom did he give the order? This does not appear. It would be presuming a great deal in favor of the plaintiff showing to presume the order to have been given to the clerk, with an additional order to him to give it to the plaintiff. The rule is that no presumptions are to be made in such showings. They are made *ex parte*, and the burden is on the one who relies upon it is to make it conform to the facts.

It was no necessary, or even proper part of the plaintiff's case to show that the notes and accounts should be set out in the record.

As to the verdict, we think there is evidence sufficient to support the record to justify it. True, there is strong evidence that the debt was paid, or admitted to be paid; but the testimony of the witness was attacked, and it was for the jury to decide. We are very reluctant to disturb a verdict, or a judgment, when the Judge who presided at the trial refuses to set it aside. Judgment affirmed.

Daniel vs. Sullivan.

ELLIS DANIEL, plaintiff in error, vs. HILLIARD H. SULLIVAN, defendant in error.

he domicile or residence of a person of full age, and laboring under no disability, is the place or county where the family of such person shall permanently reside, if in this State, and suit should be there instituted against him. (R.)

Venue. Domicil. Residence. Before Judge JOHNSON.
Talbot Superior Court. March Term, 1872.

For the facts of this case, see the decision.

MARION BETHUNE, represented by B. B. HINTON, for plaintiff in error.

L. H. WORRILL; W. A. LITTLE, for defendant.

VARNER, Chief Justice.

he plaintiff sued the defendant on a promissory note in county of Talbot. The defendant filed his plea in abatement to the jurisdiction of the Court, alleging that he was a man and resident of the county of Monroe, in this State. The evidence on the trial went to show that the defendant was a married man, that his wife and family resided in the county of Monroe, but that the defendant had a plantation in the county of Talbot, and spent a considerable portion of his time in the latter county. The Court charged the jury that if the defendant had a family at and before the commencement of the suit, consisting of his wife and children, and he had not abandoned, and if his wife and children were permanently resident and domiciled in the county of Monroe, in this State, then the defendant, by operation of law, was a citizen of Monroe county, although he might have a place in Talbot county and spent most of his time at Talbot. To this charge as given, and the refusal to charge as requested, the plaintiff excepted. There was no error in the decision of the Court to the jury on the facts as disclosed in

 Booth vs. Saffold.

the record, or in refusing to charge as requested. The domicile or residence of a person of full age, and laboring under no disability, is the place or county where the family of such person shall *permanently* reside, if in this State, and suit should be instituted against him in that county: Code, 1639.

Let the judgment of the Court below be affirmed.

ROBERT N. BOOTH, plaintiff in error, vs. THOMAS P. SAFFOLD, defendant in error.

1. Where A and B entered into a written contract, in which A agrees to sell and make a fee simple title to B to a parcel of land, and B agrees to pay to A, \$800 in cash on a fixed day thereafter, and to give on that day his note for \$300, due one year thereafter, and B took possession of the land:

Held, That the covenants of A to make the deed, and of B to pay the money, were mutual and dependent covenants, and an action would lie in favor of A for the money on his offer to perform, and B thereupon failing or refusing to pay the money.

2. In mutual covenants of this character, it is not necessary that a formal tender shall be made by either party. If one offers to perform his part of the covenant and the other refuses, the right of action is complete, and it is not necessary that the party offering to perform shall prepare the deed and tender the same.
3. If B buy land from A and take possession, he cannot resist the payment of the purchase-money if he has not been disturbed in the possession by showing A's want of title, unless he show that A is insolvent, or show other facts to establish the insufficiency of his warranty.

Covenants. Tender. Warranty. Before Judge ROBINSON, Morgan Superior Court. March Term, 1872.

Thomas P. Saffold brought assumpsit against Robert N. Booth, and alleged that on November 25th, 1867, plaintiff and defendant entered into a written contract, by which plaintiff agreed to make to defendant a fee simple title to a certain house and lot in the town of Madison, in consideration of which said defendant agreed to pay to plaintiff \$800 on January 1st, next thereafter, and to give his note for \$300

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December 25th, 1868; that after the making of the said tract said defendant went into possession of said property the owner thereof; that said defendant has failed, and refused to pay said sum of money, and to give his note; that plaintiff has been, and now is ready to make to said defendant a fee simple title to said house and lot, whenever said defendant will perform his part of said agreement. Prays process may issue, etc.

The defendant pleaded: 1st, The general issue; 2d, That contract sued on was made with the understanding that was to pay for said property, with the proceeds of a house lot sold by him to Dr. W. L. Hitchcock; that said Hitchcock has failed to pay said purchase-money which has rendered defendant unable to meet his engagement, thus contractually entered into; 3d, Paramount title to said property chased in a person other than plaintiff.

The evidence is unnecessary to an understanding of the decision of the Court, and is therefore omitted.

The jury returned a verdict for the plaintiff for \$1,100 principal, \$304 24 interest and costs of suit. The defendant moved for a new trial on the following grounds, to-wit:

1st. Because the Court refused to charge as requested, as follows: "That if the jury believe from the evidence that plaintiff did not have a good title to the whole of said property, he, defendant, is not required by law to pay the purchase-money, and then sue upon a breach of the warranty, may avail himself of plaintiff's not having such a title as a defense to an action against him to recover the purchase-money."

2d. Because the Court erred in charging the jury as follows: "That by the contract the obligations of plaintiff and defendant were concurrent and to be performed at the same time."

3d. Because the Court erred in charging the jury as follows: "That the declaration made to the defendant by the plaintiff that he was ready and willing to make a deed to

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the defendant if he would pay the money, was a sufficient legal tender of the deed."

4th. Because the Court erred in charging the jury as follows: "That the question as to whether or not the plaintiff had a good title to said property has nothing to do with the case."

5th. Because the verdict of the jury is contrary to the following charge of the Court: "By the terms of this contract the plaintiff is bound to make a fee simple title to the premises, and deliver the same to the defendant before the defendant is required to pay to the plaintiff the purchase-money, and unless you believe, from the evidence, that the plaintiff made and tendered to the defendant a fee simple title to the premises, or was prevented from so doing by some act of the defendant, the plaintiff cannot recover."

The motion for a new trial was overruled, and defendant excepted upon each of the aforesaid grounds, and assigns said ruling as error.

BILLUPS & BROBSTON, for plaintiff in error.

A. REESE; JOSHUA HILL, for defendant.

McCAY, Judge.

It is clear to our minds that the written contract between these parties makes the payment of the \$800 and the execution of the "fee simple" deed mutual covenants to be performed contemporaneously. Saffold stipulates that he will make the deed, and the other stipulates that he will pay \$800 "in cash" on the first of January then next, and give his note for the balance to be due at a future time. Evidently by the use of the words \$800 *in cash* they mean something more than a mere agreement to pay that amount on the first of January then next. The word cash implies some absolute payment at the time the other party agrees. Ordinarily it means present payment, but under the circumstances here disclosed it can mean but one thing—that

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to make the deed and Booth pay the \$800 cotemporary—to-wit, on the first of January. In other words, to be mutual, dependent acts. The making of the deed on the one side, and the payment of the \$800 cash and giving of the note, on the other side. This is the common law of the contract, and so, under our law, ought it to be held. See Code, section 4.

If covenants are mutual and dependent, a right of action accrues to either party on his performance or on his non-performance, if the performance is defeated by the fault of the other party: Revised Code, section 2822. Nor is it necessary that the party offering to perform shall go through the form of regular tender. It would often be enough for the party desiring to perform to require him to do so. In ordinary cases, for the payment of money, a tender is required. But where by the contract both the parties are to do something, perform some definite act, then a refusal to perform by one and a refusal to perform by the other gives a right of action to the party offering to perform. It is just this case. Saffold was, on his part, to make the deed, the other to *pay the money and give his note*. Saffold was not required to execute the deed and tender it to Booth. This would have been useless, since Booth distinctly refused to do so. He made a formal offer to perform, and the actual performance was defeated by Booth's fault.

The settled rule, as laid down in the books, gives to the party offering to perform a right of action if the other party refuses to perform or cannot perform. In cases where each party is to do something to do other than the payment of money, a tender is required. An offer to do by one and a refusal to do by the other is sufficient: Saunders on Pleading and Evidence, 1st volume, [209.]

In the making of the agreement, the defendant below took possession of the land and he has not been disturbed in that possession. Why should he keep the land and refuse to pay the money? Perhaps he may never be disturbed, and if he is not, he will never be paid. See Code, section 19.

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succeeds in his plea he may have the land and not pay the money. This would be grossly unjust, and is not the law. He has Saffold's agreement, and if he fails to perform it he has his right of action on it. If Saffold were insolvent, or non-resident, or any other good reason were shown why the agreement could not be recovered on, equity would interfere. But even then the defendant could not keep the land and refuse to pay the money.

Judgment affirmed.

W. A. MCGHEE, plaintiff in error, vs. AMOS S. WAY, defendant in error.

1. Where execution was levied upon land which had been set apart as homestead, the plaintiff having made affidavit that the debt upon which the execution was founded was for the purchase-money, and the defendant filed a counter-affidavit to the effect "that, to the best of his knowledge and belief, he paid the purchase-money for the land levied on," a demurrer to said counter-affidavit was properly sustained. (R.)
2. The mere allegation in an affidavit of illegality that the judgment is for an amount considerably greater than the verdict, without stating how large is the excess, is insufficient. (R.)

Homestead. Purchase-money. Counter-affidavit. Before Judge HARRELL. Stewart Superior Court. April Term 1872.

For the facts of the case, see the decision.

BEALL & TUCKER; H. FIELDER, for plaintiff in error.

J. L. WIMBERLY; JOHN T. CLARK, for defendant.

WARNER, Chief Justice.

The plaintiff in the Court below levied an execution on the property of the defendant, which had been set apart as homestead, first making an affidavit, as required by the act of 1871, that the debt on which the execution was founded

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was a debt due for the purchase-money of the land levied on. The defendant in execution filed two counter-affidavits, in one of which he stated that, to the best of his knowledge and belief, he had paid the purchase-money for the land levied on, and that he has other lands in his possession that has not been homesteaded. In the other, he stated that the judgment entered up against him is considerably greater than the verdict of the jury in the case on which the *fi. fa.* was founded. The plaintiff demurred to both affidavits, the demurrer was sustained by the Court, and the affidavits dismissed, whereupon the defendant excepted.

The counter-affidavit of the defendant does not deny the truth of the plaintiff's affidavit, but states to the best of his knowledge and belief that he had paid the purchase-money for the land levied on, but when or to whom he does not state, nor whether before or after judgment. He does not state that he has paid the judgment rendered against him, on which the execution issued. The Act required him to deny the truth of the plaintiff's affidavit in his counter-affidavit, so as to form an issue thereon to be submitted to the jury. What number of acres of other lands, not covered by the homestead, are in his possession, is not stated, or whether the same is subject to the plaintiff's execution. The other affidavit, that the execution is *considerably* greater than the verdict, is entirely too indefinite. He should have stated how much greater, so as to show to the Court the true amount that was actually due on the judgment. There was no error in sustaining the demurrer to both affidavits.

Let the judgment of the Court below be affirmed.

MARY J. ALEXANDER, executrix, plaintiff in error, vs.
JAMES W. ALEXANDER, JR., *et al.*, defendants in error.

[Implied trusts are not within the statute of frauds, and the Courts will hear parol evidence, showing the facts from which they are sought to be implied.

McGee vs. Way.

succeeds in his plea he may have the land and not pay the money. This would be grossly unjust, and is not the law. He has Saffold's agreement, and if he fails to perform it he has his right of action on it. If Saffold were insolvent, or non-resident, or any other good reason were shown why the agreement could not be recovered on, equity would interfere. But even then the defendant could not keep the land and refuse to pay the money.

Judgment affirmed.

W. A. MCGHEE, plaintiff in error, vs. AMOS S. WAY, defendant in error.

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2. The mere allegation in an affidavit of illegality that the judgment is for an amount considerably greater than the verdict, without stating how large is the excess, is insufficient. (R.)

Homestead. Purchase-money. Counter-affidavit. Before Judge HARRELL. Stewart Superior Court. April Term 1872.

For the facts of the case, see the

BEALL & TUCKER; H. FILL

J. L. WIMBERLY; JOHN

WARNER, Chief Justice

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homestead, first
of 1871, &

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2. Where one holds the legal title to property, but the same has been paid for by or with the funds of another, the law implies a trust.
3. Where a guardian has purchased property with the funds of his wards, and has, by his written and sworn answer to a bill in equity, so declared, and that he holds it for their use, the wards may recover the property in a Court of law, notwithstanding it may appear that the guardian took the deed to himself, making no mention of his wards.
4. Receipts in full by wards to their guardian, which, in express terms, discharge the guardian from all liability, may be explained by parol, and will only cover such matters as were intended to be covered thereby.
5. A receipt in full by a ward to his guardian, discharging him from all claims the ward may have against him, in law or in equity, does not convey to the guardian any title to the land held by the guardian for him, even though the same be held under an implied trust, especially if, at the time of the receipt, the ward has reason to believe that the title of the land is to the guardian as guardian.

Claim. Implied trust. Parol evidence. Statute of frauds. Guardian and ward. Receipt. Before Judge HARRELL. Early Superior Court. April Term, 1872.

Mary J. Alexander, as the executrix of Martin T. Alexander, deceased, advertised certain real estate for sale, as the property of her testator, on the first Tuesday in December, 1871. Columbus C. King and James W. Alexander, Jr., filed a claim to said land, alleging that the same was the property of James W. Alexander, Jr., Columbus C. King and his wife, Caledonia King, and of Josephine Alexander.

Upon the trial of the issue formed by the aforesaid claim in the Superior Court, the following evidence was introduced for the executrix, to-wit:

1st. A deed from Anthony Hutchins to Martin T. Alexander, covering the property in dispute, dated July 20, 1863, and purporting to have been made upon consideration of the payment of \$15,750. Recorded April 3d, 1872.

2d. An agreement of settlement of all matters in dispute between Caledonia King, daughter of A. C. S. Alexander, deceased, and Martin T. Alexander, administrator upon the estate of her father, and guardian of his children, to the said estate, by which said Martin T. Alexander is to

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0 cash, and \$500 in October next, with interest from
 In consideration of which John B. Mulligan, as trustee
 ledonia King, Columbus C. King, her husband, and
 mia King, herself, release all other rights which they
 held against said Alexander, in law or in equity, as ad-
 rator or guardian, and agree that the cases now in suit
 ered settled, and all claims not in suit to be hereby set-
 full. Dated June 26th, 1869.

The following release, to-wit:

ORGIA—EARLY COUNTY:

his instrument witnesseth that, in consideration of fif-
 hundred dollars, (\$1,500,) paid me by M. T. Alexander,
 lually, I relinquish and convey unto him all my in-
 or claim which I, in right of myself, may have, either
 or in equity, in the estate of A. C. S. Alexander, and
 hereby acknowledge myself fully satisfied for all claims
 have against said M. T. Alexander, as administrator
 rdian of said estate, or in anywise on account of his
 tion with or management of said estate, and the case
 g in equity in said county in favor of myself *vs.* said
 T. Alexander, administrator or guardian, as afore-
 hereby settled, and to be so entered of record.
 itness my hand and seal this May 18th, 1869.

(Signed) "J. W. ALEXANDER, JR." [L. S.]

y J. Alexander, sworn: Is the executrix of M. T.
 ider, deceased; is his widow; the lands now in dispute
 rmerly in possession of A. C. S. Alexander, deceased,
 ber of claimants, on whose estate M. T. Alexander was
 strator, and as such sold the said property at public
 Anthony Hutchins became the purchaser and subse-
 y sold it to M. T. Alexander, and made the deed read
 ence. M. T. Alexander held the land as the property
 children, two of whom are the claimants, for whom he
 ardian from the time the land was purchased by An-
 Hutchins until he settled off with them; after that
 e held the land and claimed it as his own; he was in

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possession of it, as his own, at the time of his death, and was also in possession of the land at that time as guardian for Josephine Alexander, he never having settled with her for her interest in the land.

The following evidence was introduced for claimants:

John B. Mulligan, sworn: Witness knows the land in dispute; it was the property of A. C. S. Alexander, deceased was present when it was sold by M. T. Alexander, as administrator; it was sold at public sale at Blakely on a regular sale day; Anthony Hutchins was the crier at the sale and bid off the property for M. T. Alexander; has heard M. T. Alexander say several times that James W. Alexander was entitled to and owned one-fourth of the property now in dispute; it was prior to May 18th, 1869; does not recollect having heard him since that time use the exact language that James W. Alexander was entitled to one-fourth of the land but has heard him say that he held the land as collateral security against the Ransom debt, and that if he did not have it to pay, James W. Alexander and the other heirs would have their interest in the land. The \$1,500 mentioned in the receipt given by James W. Alexander was paid in notes held by M. T. Alexander, as guardian for James W. Alexander and his sister Caledonia King, part contracted for redemption of land and part for the sale of personal property belonging to the wards; James W. Alexander rented the place from M. T. Alexander, as the guardian of himself and sister, and was in possession from the close of the war until January 1st, 1871.

Brinkly Chaney, sworn: Witness contracted a debt on iron with James W. Alexander; in 1866, M. T. Alexander agreed to be responsible for it, as he was his guardian and was indebted to him; in 1870, witness applied to M. T. Alexander for payment; he refused, saying he had settled with James W. Alexander, and did not owe him anything but if he did not have to pay the Ransom debt, James W. Alexander and the heirs would still have their interest in the A. C. S. Alexander place, but if the Ransom debt had been paid they would have nothing; this was said to witness.

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of 1870, a month or two before M. T. Alexander

ants introduced the Tax Digest of 1867, 1868 and showing that M. T. Alexander gave in the property during those years, as guardian for claimants and wards, children of A. C. S. Alexander. Claimants read a portion of an answer made by M. T. Alexander filed in equity by a portion of the distributees of the A. C. S. Alexander in March, 1867, in which he set forth in his defense, that the land in dispute was ordered of Court on the first Tuesday in January, 1863, purchased by him through his agent, Anthony Hutchins, for use of and expressly for his wards, the children of the A. C. S. Alexander, deceased. The executrix introduced the Tax Digest of 1870, showing that Martin T. Alexander gave in the property for that year in his own name.

The Court charged the jury as follows, to-wit: "The duty of the jury to decide in this case is, whether the property involved in this controversy are the property of the M. T. Alexander, or of the claimants, and this issue is to be determined from the evidence submitted to you. The executrix introduced a deed from A. Hutchins to M. T. Alexander, dated July 20th, 1863, and insists that he went into possession of the land under that deed as his own property. If this is established by the evidence to your satisfaction, he is entitled to hold it unless the claimants show a better title. The claimants show no written title, but insist that they have established facts by proof, which invests them with title as against the written title of the executrix. Let:

That the deed under which M. T. Alexander held the land is void, because he purchased the land at his own sale as administrator of A. C. S. Alexander, deceased, who was not James W. Alexander, one of the claimants, and not Columbus King, in whose right Columbus King is another, his possession of the land was not in his own right but as trustee for them. If you believe, from the

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evidence, that M. T. Alexander purchased and paid for the land, whether from another or at his own sale as administrator, it vests the title in him subject to the right of creditors of the estate upon proper proof, or the heirs of A. C. S. Alexander within a reasonable time after they attain their majority, to set aside and make void the sale as a matter of right. The heirs of Alexander cannot, however, do this in this proceeding.

"They insist, 2d, that the deed to M. T. Alexander was fraudulent and on this account vested no title in him. They can attack the deed on this account in this proceeding, and if you believe, from the evidence, that the deed under which M. T. Alexander held the land was fraudulent, that he procured it to be made for the purpose of defrauding them or any one else, then such deed did not vest the title to the land in him as against them. On the contrary, if it was not fraudulent, but made and held in good faith by M. T. Alexander, the title would vest in and belong to him, subject to the law, as will be given to you in the following charge.

"3d, The claimants insist that although the deed to Alexander is an absolute deed, the consideration therefor was paid by him with funds belonging to them, and that, although holding an absolute deed, he was only a trustee for them. If you believe, from the evidence, that the entire consideration paid by M. T. Alexander for the land was the funds belonging to claimants, and that he held the same as their trustee and not in his own right, then the land is theirs, and you can, in this case, so mould your verdict as to vest the title in them. But if it was not so paid for with funds belonging to them, but was paid for by Alexander with his own money and he bought the same as his own property, you should find it.

"The executrix also introduced certain receipts, which, before you, signed by claimants, which, she insists, released M. T. Alexander from all claims whatever in relation to the estate of A. C. S. Alexander, including this land, even if they had an interest in it. The claimants insist that if

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id was not included in the receipts but only other property. That is a question for you to determine from the evidence. If there was a full and fair settlement and did include the land, they are bound by the settlement. If it did include the land, then determine from the evidence and the law as I have given it to you in charge the other it, to whom the land belongs. If you believe that M. T. Alexander held the land for the claimants, and that M. T. Alexander has so acknowledged it, and acknowledged even the money of claimants, his wards, paid for the land, the said M. T. Alexander held the land for the use of claimants; and if the evidence shows that the claimants were not parted with their interest in the land, then you can find for claimants.

If you believe that M. T. Alexander took a title to the land from Anthony Hutchins in 1863, and kept it a secret and never recorded it until the day of trial, to-wit: 3d of July, 1872, and that claimants had no notice of how the land was made out, and were acting under the statements of M. T. Alexander that he held it for claimants, they are not at fault for failing to proceed against M. T. Alexander to eject the deed and assert their interest, but are allowed to set up their interest in this proceeding. They can do so if Alexander held the title fraudulently, or if he was not the *bona fide* holder, but held it as trustee for them. Title in Georgia must be conveyed by deed regularly executed, and a mere receipt of a ward or heir for all rights and claims that he has against the guardian or administrator does not of itself, convey title to land, but can only be evidence of an agreement to convey title, if the facts clearly show that to be the case. It may if it includes the land, otherwise not."

The jury returned a verdict in favor of the claimants. By J. Alexander, the executrix, moved for a new trial on the following grounds, to-wit:

1. Because the Court erred in admitting the evidence of B. Mulligan and Brinkly Chaney, against the objections of said executrix.

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2d. Because the Court erred in admitting in evidence the part of the sworn answer of M. T. Alexander to the bill, in evidence, against the objections of said executrix.

3d. Because the jury found contrary to law and evidence.

4th. Because the Court erred in its charge to the jury.

The motion for a new trial was overruled, and Mary J. Alexander, executrix, excepted upon each of the *aforemid* grounds and assigns said rulings as error.

RICHARD SIMS; H. FIELDER; R. H. POWELL, for plaintiff in error. 1st. Equitable interest cannot be set up on trial of claim: 8th Ga. R., 258; 20th *Ibid.*, 148; 30th *Ibid.*, 450. 2d. All evidence to contradict the receipts was illegal.

THOMAS F. JONES; FLEMMING & RUTHERFORD, for defendants. Receipt for share in estate, parol evidence admissible to show whether in full: 27th Ga. R., 78. Parol evidence admissible to show what land is covered by a deed: 20th Ga. R., 689; 18th *Ib.*, 181; 25th *Ib.*, 383. Terms general, particulars shown by parol: 30th Ga. R., 482. Receipts exceptions to general rule as to admissibility of parol evidence: 3d Ga. R., 210; 5th *Ib.*, 373. Parol evidence as to matters outside of contract admissible: 14th Ga. R., 428. Parol evidence admissible to show anything consistent with the instrument: 28th Ga. R., 98; 21st *Ib.*, 526.

MCCAY, Judge.

Nothing is better settled than that an executor or administrator who buys property at his own sale, either directly or indirectly, holds it subject to the option of the *cestui que trusts*, to affirm or disaffirm the sale. The purchase by the trustee is *prima facie* a fraud, and however the formal title may be, he holds the property as trustee, under the implied undertaking which the law casts upon him.

One of the instances given by our Code (section 2290) of an implied trust is when, from any fraud, one person obtains the

Morton vs. The State of Georgia.

See, also, *Wooten vs. Benton*, 15 *Georgia*, 570. The parol evidence was most material here. Were it definitely understood at the time, that this administrator had bought the land at his own sale, it was competent for the wards of full age to agree that he might keep it as his own, he accounting to them for the price, and it was therefore of the highest importance to show that at that time they were resting under the belief that he had bought the land not for himself, but for them. And that he was holding it not as land he had bought and was to pay for, but as the land of his wards. His answer to the bill was strong, conclusive proof of this, especially as it appears from the record that it was not disclosed until at the trial that any deed was taken to the administrator in his own name. His statements, his acts, and especially his answer, all went to show that he had taken the title to himself as guardian. Upon the whole we think the evidence properly admitted and the verdict right.

Judgment affirmed.

SAMUEL T. MORTON, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

1. Where a defendant is on trial for carrying concealed weapons, evidence as to his motive in placing the pistol in his pocket is inadmissible. (R.)
2. It was not error in the Court to charge "that the question for the jury to determine upon the evidence was, whether the defendant had carried about his person a pistol, not being a horseman's pistol, and not being had or carried about his person in an open manner, and not exposed to view, that if he so had, as charged in the indictment, at the time that he so had it was not important; if he for any length of time, however short, for a moment so had it contrary to law, he was guilty of the offense, otherwise not." (R.)

Criminal law. Concealed weapons. Opinion of the Court.
Before Judge HARRELL. Miller Superior Court. All Term, 1872.

Morton vs. The State of Georgia.

Samuel T. Morton was placed on trial for the offense of carrying "about his person a pistol and not in an open manner and freely exposed to view, (said pistol not being a horseman's pistol.") The defendant pleaded not guilty.

The only witness sworn was F. M. Platt, who testified substantially as follows: That he saw defendant going across the public square in Colquitt, in said county, with a small-sized repeater pistol in his hand, firing the same off; that witness, as marshal of said town, followed to arrest him; that when he came up to him, defendant put the pistol in his pantaloons pocket so that it could not be seen; that defendant only kept the pistol in his pocket a half minute or a minute, but while it was so kept it was entirely concealed from view; that witness thinks defendant put the pistol in his pocket to keep witness from taking it; that afterwards defendant took the pistol out, and squatting down, unlatched the barrel and started to take the cylinder out, when witness seized the pistol and took it away from him.

The defendant's counsel asked the witness "what was the reason that defendant put the pistol in his pocket?" Upon objection, the Court refused to allow said question to be asked.

The jury found the defendant guilty; whereupon, he moved for a new trial upon the following grounds, to-wit:

1st. Because the Court erred in rejecting the evidence showing the motive of defendant in placing the pistol in his pocket.

2d. Because the Court erred in charging the jury as follows: "That the only question for the jury to decide was whether the defendant had for one moment on his person a pistol, not in an open manner and fully exposed to view, the same not being a horseman's pistol, and if they should find in the affirmative, they should find the defendant guilty," thereby leading the jury to believe that they could not consider the intention of the party defendant.

3d. Because the verdict is contrary to evidence and the right of evidence.

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The presiding Judge attached the following note to the second ground:

"The Court charged that the question for the jury to determine upon the evidence was whether the defendant had or carried about his person a pistol, not being a horseman's pistol, and not being had or carried about his person in an open manner and fully exposed to view; that if he so had, as charged in the indictment, the time that he so had it was not important, if he for any length of time, however short, for a moment so had it contrary to law, he was guilty of the offense, otherwise not."

The Court overruled the motion for a new trial and plaintiff in error excepted.

W. P. SIMS; JOHN E. DONALDSON; H. C. SHEFFIELD; ISAAC BUSH; H. FIELDER, for plaintiff in error.

J. S. FLEWELLEN, Solicitor General, represented by B. S. WORRILL, for the State.

WARNER, Chief Justice.

The defendant was indicted for a misdemeanor in having and carrying about his person a pistol concealed, in violation of the 4454th section of the Code. On the trial of the case the jury found defendant guilty. A motion was made for a new trial on the several grounds specified in the record, which was overruled by the Court and defendant excepted. There was no error in the refusal of the Court to allow the witness to testify as to the *motive* of the defendant, in putting his pistol in his pocket. The witness could legally only testify as to *facts*, and it was a question for the jury to determine what were the motives of the defendant, from the facts proved by the witness. In view of the evidence disclosed in the record there was no error in the charge of the Court to the jury. In our judgment there is sufficient evidence in the record to sustain the verdict, and the motion for a new trial was properly overruled. The practice of carrying concealed weapons

 Adams vs. Worrill.

a great evil, which the law prohibits, and the Courts and
ries should rigidly enforce the law against all who violate

Let the judgment of the Court below be affirmed.

F. ADAMS, plaintiff in error vs. EDMUND H. WORRILL,
defendant in error.

make one a "claimant" of the property, within the meaning of section
5 of the Act of October 18, 1870, so as to be permitted to file the coun-
ter-affidavit there provided for, he must put in a claim to the property,
under the claim laws of this State.

Relief Act of 1870. Tax-affidavit. Claim. Before Judge
ARRELL. Stewart Superior Court. April Term, 1872.

An execution in favor of Edmund H. Worrill against
Charles B. Adams, administrator, and Holland Adams,
ministratrix of Samuel Adams, deceased, for \$1,955 35,
incipal, and \$600 61, interest, based upon a contract created
fore June 1st, 1865, was levied upon certain real estate, as
e property of defendants in execution. R. F. Adams filed
affidavit that he claimed the property levied on, and that
legal taxes chargeable by law on said execution had not
en paid. When the case was called in the Superior Court
e plaintiff in execution moved to dismiss said affidavit, on
e ground that there was no evidence that said affiant was
claimant of said property. The Court sustained the motion
d dismissed the affidavit.

R. F. Adams excepted to said ruling and assigns the same
error.

BEALL & TUCKER, for plaintiff in error.

H. FIELDER; S. G. RAIFORD, for defendant.

Funderburk vs. Gorham *et al.*

McCAY, Judge.

It is our judgment that the word "claimant," used in the fifth section of the Act of October 13th, 1870, means one who has put in a "claim" to property levied on at an execution, as provided by our claim laws. That is the technical meaning of the word in this State, when used in the connection in which it is used in the section referred to. The object of the Act was to give the "claimant," in case property was levied on and claimed under an execution on a debt contracted before June, 1865, the same right to attack the *fi. fa.* for want of the payment of taxes as the defendant had. But to do this he must be a claimant. He must have put in his claim as the law requires. It is only when this has been done that he can be recognized as a claimant. Until he thus becomes a party to the proceedings, he is only a stranger, and has no rights or interest in the matter. Judgment affirmed.

DAVID H. FUNDERBURK, administrator, plaintiff
vs. GEORGE C. GORHAM *et al.*, defendants in

1. Where a note is given by a temporary administrator for property purchased at an administrator's sale, it does not bind the estate if the creditor represents. (R.)
2. If the property purchased is appropriated for the benefit of the estate represented by the temporary administrator, and he is not a creditor, the creditor may proceed against said estate. (R.)

Temporary administrator. Demurrer to bill.
Individual liability. Before Judge JOHNSON in the Superior Court. March Term, 1872.

For the facts of this case, see the decision.

MARION BETHUNE, represented by W. W. Worrill,
plaintiff in error.

E. H. WORRILL for defendants.

WARNER, Chief Justice.

This was a bill filed by the complainant against the defendants, to make the property of the estates of William B. Pope and Allen Pope, who died intestate, subject to the payment of the complainant's debt. The defendants demurred to the complainant's bill, which was sustained and the bill dismissed. Whereupon, the complainant excepted. The complainant alleges that at the sale of the property of his estate, one George Gorham, as the temporary administrator of the estates of the two deceased Popes, and one Brown, chased a certain amount of property for the benefit of the latter estates, and gave his note therefor, which was used by him as temporary administrator; that he obtained judgment on said note against George Gorham for \$146,60 principal, and \$18,73 for interest. Subsequently Willis J. Gorham was appointed administrator on the estates of the Popes, and moved to set aside the judgment obtained against George Gorham, so far as the same attempted to bind property of the estates he represented, which motion preceded. It is not alleged in the bill that George Gorham is *deceased*. The complainant can obtain and enforce his judgment against the individual property of George Gorham, for payment of his debt, for aught that appears on the face of the bill. The note given to the complainant by George Gorham as temporary administrator, bound him individually for payment of it, but did not bind the property of the estates which he represented. If George Gorham is not insolvent, but able to pay the note, there is no good reason given by the bill why the complainant has not an ample adequate remedy at law to compel him to do so. If George Gorham pays the note to the complainant, and it was used by him for property purchased for the benefit of the estates, and the same was appropriated and used for the benefit of the estates, he may claim the right to be reimbursed out of the property of the estates, on a proper case made, but the complainant cannot look to the estate for the payment of his debt.

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note on George Gorham, unless he is *insolvent*, which is not alleged.

Let the judgment of the Court below be affirmed.

AARON SMITH, plaintiff in error, vs. the STATE OF GEORGIA,
defendant in error.

1. An accessory before the fact to the crime of arson cannot be put upon his trial until after the conviction of the principal felon, at least not without some special reason recognized by law, showing why the principal has not been tried.
2. The confessions of a principal felon, as to his own guilt, are competent evidence to show that fact on the trial of the accessory, but the confessions must be such as would be competent evidence on the trial of the principal, and must not be induced by another with the slightest hope of benefit or remotest fear of injury to the party making them.
3. The verdict in this case is not supported by any legal evidence.

Criminal law. Accessory before the fact. Confessions.
Before Judge SESSIONS. Echols Superior Court. April
Term, 1872.

Aaron Smith was placed upon trial for being an accessory before the fact to the offense of arson, committed by Albert Franklin. Albert Franklin was present and testified at Smith's trial. He had not then been placed on trial.

The following portions of the testimony are all that are material to an understanding of the decision of the Court to-wit:

Albert Franklin, sworn: "They took me down to the place at the branch to look at the tracks; they all had guns, and scared me; Mr. Green told me that if I knew anything I did not tell it, that I would be taken to the river swamp, open, filled with sand and thrown into the river; Mr. Green did not say he would do it, but that he had known some things to be done or to turn out in that way. I said he gave me one match, but he did not give me any. I

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hem Aaron gave me one match and told me, and I went and turned the house. I did not show them the tracks at all; they showed them to me. I told them that Aaron gave me the match and I burned it, but it was not so. I was scared. They all told me that if I would tell the truth about it, I would come clear. J. L. Crawford and his son, Thomas, Mr. Hendrix and Mr. Elmore told me this."

The following evidence was objected to by defendant's counsel, and the objection overruled by the Court:

Isham Herndon, sworn: "I said to him (Albert Franklin) sit down here and tell me all about it.' He was sitting down and I asked, 'Alph., what made you do it?' He said, 'I reckon it was the old devil; yes, I know it was wrong and I am sorry for it; I did not do it with a torch—I did it with a match.' After that he got up and walked off from me. There was no threat made by any parties at all. He went up to the lot, and about one hour after that time he said he could show me tracks where he crossed the branch. There were no inducements offered to him to make him confess anything, nor was it through any fear."

James Carter, sworn: "We asked him (Albert Franklin) why he came to burn all that corn—what made him do it? He replied that the old devil made him do it. His mother asked him what made him do it. He replied that uncle told him to. No intimidation was used, but, on the contrary, he was assured that he would not be hurt."

Adam Zeigler, sworn: "Aaron (Smith) said to me to tell Albert not to use his name—not to bring him into the burning scrape. I delivered the message to Albert. He said that he burned it, and was told to burn it—that a certain man told him to do it."

The jury found the defendant guilty. A motion for a new trial was made, upon the following grounds, to-wit:

1st. Because the Court charged the jury that "an accessory for the fact can be tried before the principal in the crime," although the principal was in Court awaiting his trial.

2d. Because the Court erred in admitting in evidence the

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confessions of Albert Franklin, the principal felon, for the purpose of showing his guilt.

3d. Because the verdict was contrary to the law and the evidence.

The motion for a new trial was overruled by the Court, and defendant excepted and assigned said rulings as error.

W. H. DASHER; H. G. TURNER, by brief, for plaintiff in error. The trial of the principal must precede that of the accessory: Black. Com., p. 40, 323; Wharton's Am. Crim. Law, sec. 135; 1st Parker's C. C., 246; 17th Ga. R., 196; 28th Ga. R., 217; Code, secs. 4420, 4421.

SIMON W. HITCH, Solicitor General, represented by NEWMAN & HARRISON, for the State.

McCAY, Judge.

It was a well-settled rule at common law, that the accessory could not be put upon his trial until after the conviction of the principal felon: Wharton's American Criminal Law, section 135, 1st volume. This was changed by the Act of Anne, so that if the principal felon was delivered in any way after conviction and before attain, the accessory might be tried. In the special case of the offense of receiving stolen goods, there was an exception to the rule if the principal was outlawed. And this rule is, in effect, adopted by the provisions of our Code: Revised Code, section 4421. But we know of no other legislation changing the common law. There would seem to be great incongruity in trying, and perhaps, convicting one as accessory to the crime of another when perhaps the next day the principal may be found guilty.

As we understand this record, the defendant in this case, at his arraignment excepted on the ground that the principal had not yet been tried. We think it was error to put him on trial. We are not prepared to say that had the principal in this case been convicted, his confessions would not have been

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ood evidence to show *his* guilt on the trial of the accessory. The conviction would be only *prima facie* against the accessory and it might be supplemented and sustained by the confessions. But they must be confessions made under circumstances when they would be testimony against the principal. What is the case here? The man himself says, on oath, that they were extorted from him. This, it is true, is contradicted by the other witnesses, but even they say he was promised he should not be hurt. This is just as fatal to them as legal evidence as extortion. Hope is just as powerful an inducement, brought to bear as fear: Revised Code, section 3740. The evidence going to show the guilt of the accused, even if the guilt of the principal were established, is hardly of any weight. The prisoner had great influence and control over the principal, and after the principal was arrested the prisoner sent word to him by a friend not to bring him into it. We do not think such evidence as this sufficient to justify a conviction. We are ready to go a long way to sustain verdicts, but this would be going rather too far. There is no evidence in either of the circumstances to warrant any inference of guilt.

Judgment reversed.

X, MARSHALL & COMPANY *et al.*, plaintiffs in error, vs.
JOHN R. COOK, sheriff, defendant in error.

There is a homestead in land is set apart, the applicant is entitled to the crops growing on the same. (R.)

Rule against sheriff. Homestead. Growing crops. Before Judge COLE. Houston Superior Court. December term, 1871.

For the facts of this case, see the decision.

WESCAN & MILLER, for plaintiffs in error.

WARREN & GRICE, for defendant.

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WARNER, Chief Justice.

This was a rule against the sheriff, calling upon him to show cause why he had not made the money on certain executions placed in his hands against the defendant. The sheriff showed cause, in writing, which was traversed by the plaintiffs, and the facts were agreed to be submitted to the presiding Judge without the intervention of a jury. The Judge, after hearing the case, discharged the rule against the sheriff, and the plaintiffs excepted. It appears from the return of the sheriff, that he could not find any property of the defendant's except that which had been set apart to him as a homestead, or the crops raised on said homestead. The sheriff had been directed to levy on certain cotton in the possession of defendant. It appears from the records of the Court of Ordinary which were offered in evidence, that the defendant had taken a homestead in certain described lands and personal property, including the growing crop, and that the cotton on which he was directed to levy, and which was found in the defendant's possession, (to-wit,) from two to four bales was a part of the homestead, that is to say, in the words of the sheriff's return, was a part of the crop raised on the homestead. If it was a part of the crop raised on the homestead set apart to the defendant, then it was not subject, and the sheriff is not liable for failing to make a levy thereon. If the defendant in obtaining his homestead on the land went further and had the growing crop on the land set apart to him as personal property, that did not place him in any worse condition as to the crop on the land set apart as a homestead; he was entitled to the crop on the homestead set apart to him, whether he had claimed it as a homestead of personal property or not. The fact that he claimed the crop growing on the land as a homestead in personalty in his schedule, did not place him in any worse condition than if he had not claimed it as personalty, he was entitled to the crops raised on the land set apart as a homestead anyhow. In our judgment there was no error in the

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judgment of the Court in discharging the rule against the sheriff, on the statement of facts contained in the record.

Let the judgment of the Court below be affirmed.

JAMES A. EVERETT, plaintiff in error, vs. THE SOUTHERN EXPRESS COMPANY, defendant in error.

. Where an action was pending on a contract made before the first of June, 1865, and no tax affidavit of taxes paid was made as required by the Act of October 13, 1870, and no motion was made to dismiss for such failure, and a trial was had on the merits, it is too late, after a verdict for the plaintiff, to move for a new trial, on the ground that no affidavit was filed, and no proof given on the trial as to the payment of taxes.

. The failure to make a motion to dismiss is an implied consent that the case does not come within the Act.

When a motion is made for a new trial, on several grounds, and the Court grants the new trial on one of the grounds overruling the other grounds, and a bill of exceptions is filed to his judgment, this Court will inquire if the judgment be right in granting the new trial, and if that be right on any of the grounds taken in the motion, this Court will affirm the judgment, notwithstanding the Court below may have erred in the ground on which he placed the judgment.

When one sent to an Express Company, by a small negro boy, a slave, for transmission by the company to a distant point, a small paper box, three by four inches in size, tied with a string, which box contained a valuable diamond breast-pin, worth \$500, and no notice was given to the company of the value of the box and its contents, and the box, when delivered by the Express Company to the consignee, did not contain the pin :

That the failure to notify the company of the value of the box and its contents, under the circumstances, a fraud upon the Express Company, and a verdict for the plaintiff, against the company, ought to be set aside as contrary to law.

Verdict. Cross-bill of exceptions. Liability of Express Company. Fraud. Before Judge COLE. Bibb Superior Court. October Term, 1871.

James A. Everett brought complaint against the Southern Express Company for \$600, alleged to be the value of a diamond breast-pin delivered to said company at Fort Valley,

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Georgia, on June 12th, 1863, for transportation to Macon, Georgia, which pin was never delivered at its point of destination. The record fails to disclose any plea as filed by the defendant.

It appeared from the evidence that a package said to contain a diamond pin worth \$500, addressed to Miss Theodosia Everett, at the Female College, Macon, Georgia, was delivered to the agent of defendant in Fort Valley, Georgia, at the time set forth in the declaration, for transportation to Macon; that defendant received twenty-five cents freight; that said package was delivered to said agent by a small negro boy, ten or twelve years of age; that the pin was in a small paper box tied up with a string, and unsealed; that said negro boy had no knowledge of the contents of the box and delivered it unopened; that no information was given, at the time of the delivery to the defendant or its agent, of the contents of said paper box or package, and that no question was asked by the agent of the defendant as to its contents; that it was duly transmitted to Macon and delivered to Dr. Bonnell, the President of the Macon Female College, unopened; that Dr. Bonnell caused said box to be delivered to said Theodosia Everett, to whom it was addressed, and, upon being opened, the breast pin was found to be wanting; that said Theodosia Everett was, at the time, a student in said college; that the box was received by Miss Everett in the same condition that Dr. Bonnell received it—unopened. The jury returned a verdict for plaintiff for the sum of \$500, with interest from June 12th, 1863.

The defendant moved for a new trial upon the following among other grounds:

1st. Because the Court erred in not charging the jury the delivery to Dr. Bonnell, under the proof, was a good delivery to Miss Everett. (NOTE.—The Court charged that delivery to Miss Everett, or to any one authorized to receive it, was good delivery.)

2d. Because the verdict is contrary to the law and the evidence.

. Because the Court erred in charging the jury, "that y agent or employee of the defendant stole the breast-rhile in the possession of the defendant, the defendant iable, no matter under what circumstances it first re-d the box at Fort Valley."

1. Because the Court erred in taking jurisdiction of the and permitting the verdict for plaintiff, he not having the affidavit that taxes had been paid, and no proof g been submitted to the jury that the same were paid, igh both the contract and the failure to deliver the ge took place prior to June 1st, 1865.

motion was made to dismiss plaintiff's case upon the d last aforesaid.

a Court ordered a new trial upon the last ground, over-; the others, and plaintiff in error excepted and assigns uling as error.

K. DEGRAFFENREID; CLARK & GOSS, for plaintiff in

IBETS & JACKSON, for defendant.

CAY, Judge.

l the defendant moved to dismiss this case for want of idavit required by the Act of October 13th, 1870, the would doubtless have heard him favorably. But he neglected to do this, and both the parties have treated e as not coming within the Act. Shall the defendant, aling all the chances of a verdict in his favor on the cases, be permitted now to come in and have a new because the plaintiff failed on the trial to prove the id? It is not to be expected that the Court shall, ge he may interfere and take the defendant's case into g hands. True, the tribunal trying the case must e the case if the plaintiff shall have failed to show that g cases have been paid. Doubtless the Court here have so done, had the motion been made. Had the

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question been before the Court; had the affidavit been filed so that the defendant could not have moved the dismissal or the calling of the case, there might be some point in the motion now. But by failing to do this he has consented to try the case as though it were not within the Act, and he cannot be permitted to blow hot and cold in this way; to put the country to the trouble and expense of a trial, and because he has failed in his defense to ask that the Court come to his relief, by listening to a motion for new trial. This law is not for the benefit of the defendant, but the public. Its legal operation is to deny to suitors the benefit of the Courts until they had paid the tax due on their claims. By the *laches* of the defendant the plaintiff has got the benefit of the Courts, and it is too late for him, the defendant, to complain. But we think the Court ought to have granted a new trial, on the other ground, to-wit: that the verdict is illegal as not sustained by the evidence. True, the Judge did not put his judgment on this ground, but that was one of the grounds distinctly stated in the motion.

The *judgment* of the Court granting the new trial is excepted to; not the reasons he gave, nor the grounds he put it upon, but the order, decision or judgment of the Court, to-wit: setting aside the verdict and granting a new trial. If that judgment was good and right, for any reason contained in the record, it ought to stand. The judgment is one thing the reasons given for it another. It is with the judgment this Court has to do. Ought that to be affirmed or reversed? In our judgment, this verdict is not sustained by the evidence. This Court has, in effect, decided that very thing when the case was before it at Milledgeville, in 37 Georgia 688. The evidence there was the same as here, with the single exception that the negro boy who carried the box to the express office now testifies that he did not open the box. The evidence as to the mode in which this valuable pin was put up is the same.

The point of that decision was, that the carrier has a right to know the value of the article he is asked to carry, that

may take the better precaution to prevent persons from stealing it from him, or to prevent its loss from carelessness. An article of small value presents few temptations to the thief. The company may safely entrust it to less trustful agents, and take less pains to protect and preserve it. Valuable articles ought to be, and usually are, put in a safe and are delivered by the most trustworthy agents into the hands of the consignee. And for this extra care and risk a higher price is charged. The proof here shows that a small article of great value was, either designedly or carelessly, put in a common paper box, tied up with a string, and its value, either designedly or carelessly, concealed from the knowledge of the carrier. Who knows why? The evidence does not show; but if there was no special design—if the extra charge was not the thing sought to be got rid of, the gross negligence of the consignor amounts to fraud. It misled the carrier; it put him off his guard. He had a gem in his custody, a thing to be specially cared for, and he did not know it; and this want of knowledge was the fault of the consignor. No person of ordinary prudence would send by a messenger a valuable article like this without special notice of its value, and were his defendant an ordinary carrier, we doubt if it would be possible to get a verdict against it on such facts. Unfortunately, there is not the same carefulness to do only strict justice in cases where rich corporations are parties. But the law is neither the rich or the poor as such—justice to both is the rule.

We feel ourselves bound by the decision of this Court in this case, in any view of it, though we agree that it is right, would, were the case now first before us, give the same verdict. We think, therefore, that the verdict ought to be set aside as illegal. Judgment affirmed.

JAMES COOK, plaintiff in error, vs. MARTHA J. COOK, defendant in error.

1. In divorce cases, the husband is an incompetent witness to prove the adultery of his wife. (R.)
2. It is error in the Court to charge upon a point not in evidence. (R.)
3. An immaterial error is no ground of new trial. (R.)

Divorce. Witness. Charge of Court. New trial. Immaterial error. Before Judge JOHNSON. Talbot Superior Court. March Term, 1872.

James Cook filed his libel for divorce against his wife Martha J. Cook. The respondent made no defense. The libellant and his brother, John Cook, were introduced and proved adultery upon the part of respondent, and an immediate separation thereupon between the parties.

The Court charged the jury, "that the law authorized them to decree a divorce in cases of adultery on the part of the wife; but that if the libellant abandoned his wife without sufficient cause, and by his bad conduct to her exposed her and she committed adultery, he was not entitled to have a divorce."

The jury returned a verdict for respondent and libellant moved for a new trial upon the following grounds, to-wit:

1st. Because the charge of the Court was contrary to law and unauthorized by the facts.

2d. Because the verdict of the jury was contrary to law.

3d. Because the verdict of the jury was so far contrary to the evidence as to shock the moral sense.

The Court overruled the motion for a new trial, and plaintiff in error excepted and assigns said ruling as error.

CAREY J. THORNTON; G. N. FORBES, represented by D. HARRISON, for plaintiff in error.

No appearance for defendant.

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WARNER, Chief Justice.

The complainant filed a libel against the defendant for a divorce. On the trial, the jury found a verdict for the defendant. The complainant made a motion for a new trial, on the ground of error in the charge of the Court, and because the verdict was contrary to law and the evidence, which was overruled by the Court and the complainant excepted. The evidence in the record, if the jury believed the two witnesses, (the complainant and his brother,) made out a pretty clear case of adultery on the part of the defendant. The complainant, however, was an incompetent witness to prove the adultery of his wife, as declared by the 3799th section of the Code. Although we think the Court erred in charging the jury in relation to the abandonment of his wife by complainant, and his bad treatment of her, (there being no evidence to authorize the charge,) still, as it was the exclusive province of the jury, in cases of divorce, to judge of the credibility of the witnesses, and to determine whether sufficient proofs had been submitted to their consideration to authorize a divorce between the parties, and they having found, by their verdict, that there was not, and the presiding Judge being satisfied with the verdict, we will not reverse the judgment of the Court below in refusing to grant a new trial for the alleged error in the charge of the Court. In divorce cases, the jury of the vicinage are much better acquainted with the parties and witnesses than we can be, and of the propriety of decreeing a dissolution of the marriage contract.

Let the judgment of the Court below be affirmed.

HN *ISAM et al.*, plaintiffs in error, *vs.* WILLIAM HOOKS,
defendant in error.

This Court will be slow to control the discretion of the Judge of the superior Court in his grant of a temporary injunction, especially if the bill contain charges of fraud.

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2. In this State, a levy upon land is made by the entry of the sheriff upon the *fi. fa.* ; there is no actual seizure, and there is no levy until the entry is made.

Injunction. Fraud. Levy. Tried before Judge CLARK.
Sumter county. At Chambers. July 17th, 1872.

William Hooks filed his bill, setting up, substantially, the following facts: About January 29th, 1870, Alexander M. Little begged complainant to assist him in satisfying certain of his creditors who were resisting his application to withdraw his petition to be discharged as a bankrupt, which he had filed in the United States District Court for the Southern District of Georgia. He represented that he owned eight hundred acres of land in Sumter county, also other lands in said county, and in other counties, of the value of \$.....; that he had paid every judgment against him except one in favor of R. H. Givins, transferred to Mr. Stansell, and one in favor of H. K. McCay, W. B. Guerry and S. H. Hawkins; that if the proceedings in bankruptcy continued, the assignee would sell all of his valuable property, and he would save nothing but his homestead, under the Bankrupt Act, which was small; that, moved by the continued appeal of Alexander M., complainant signed certain notes of said Alexander M. as security, taking a transfer of the judgments for which said notes were given, and also a mortgage upon certain lands, to secure the payment of the same; that when said notes became due, they were paid by complainant; that in consideration of the moneys advanced for him, said Alexander M., on March 31st, 1871, conveyed to complainant, by deed, lot of land number one hundred and ninety-three, the twenty-seventh district of Sumter county; that it was his understanding that complainant should use the transferred judgments for the protection of his rights; that, casually, the first Tuesday in April, 1872, complainant attended the sheriff's sale for Sumter county without knowing that he had any business there, and accidentally ascertained that the owner, W. W. Guerry, acting sheriff, was proceeding to

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said lot of land conveyed to complainant, as aforesaid, as the property of said Alexander M., under an execution in favor of S. R. Lawrence, obtained at October Term, 1867, of Sumter Superior Court for \$1,200 principal, besides interest and costs; that though complainant had been in possession of said land, yet the first notice that he received of said intended sale was when the bidding commenced; that complainant immediately notified all concerned that said land belonged to him, and requested the Coroner to delay the sale for even as short a time as fifteen minutes; that said land was not seized by W. J. Bosworth, assuming to act as sheriff until the day before the said sale, when the entry of levy was made; that said Bosworth was not then sheriff, having ceased to act as such many days prior thereto; that said levy and sale was therefore a nullity; that said land was knocked off to N. A. Smith, who had full notice of complainant's claim; that no persons bid for said land except Alexander M. Little and said Smith; that said Alexander M. Little spared no efforts to encourage the bidding for said land; that John Isam, who claimed to own the execution under which said land was sold, was present at the sale, having frequent interviews with the said Alexander M. Little; that said Isam spent the night subsequent to the sale with said Little, and complainant believes also the night preceeding; that the Coroner executed titles to said lot to John Isam and David A. Mayo; that said Isam is the mere tool of Little to swindle complainant out of said land, and has combined and confederated with him for that purpose; that since said pretended sale they have taken in with them David A. Mayo, for the purpose of giving the air of respectability to their combination to swindle complainant; that no money was paid at said pretended sale except, perhaps, some cost to the officers of court; that the pretended cause of action upon which said execution was based was a mere sham by which said Little sought to encumber his property for the purpose of defeating the rights of his creditors; that there is no such person as Samuel R. Lawrence, he being a man of straw, manufactured

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for the occasion ; that if the judgment under which said sale was effected is a valid, subsisting judgment, then the judgments held by complainant as aforesaid being of older date and of prior lien, are entitled to the proceeds ; that the said Guerry, Coroner as aforesaid, is threatening to dispossess said complainant ; that he is ready to give bond and security to said purchasers harmless from any damage they may sustain from any restraining order the Chancellor may think proper to issue. Prayer, that the writ of injunction may issue restraining all of said parties from interfering with the execution of said judgment until the further order of the court, and that the writ of subpoena may issue.

The complainant by an amendment to his said bill alleges that the judgment under which the aforesaid sale was made was against William Hughes, as principal, and Alexander Little, as security ; that said Little and his brother-in-law, the said Hughes, entered into a criminal combination to defraud the said complainant of his just rights ; that the pleading which said judgment was rendered show an acknowledgment of service, purporting to have been made by the said Hughes, which complainant charges to be a base forgery ; that the same was made by Little ; that the case of *Sturgis vs. Sturgis*, and Little was not reached in its oral argument on the docket at the October Term, 1867, but at the suggestion and prompting of the defendant Little, a confession of guilt was made, voluntarily, by A. R. Brown, Esq., for the said complainant charges to have been unauthorized ; that the complainant waives discovery as to all the defendants, except N. A. Smith, Esq.

The defendant, Alexander M. Little, answered the bill and admitted his bankruptcy as therein charged, but denied all the material allegations, setting forth who the defendant Samuel R. Lawrence, was, and the consideration of the contract upon which said judgment was based. He further admitted that he had represented to complainant that there were no liens on the land beyond certain specified ones, which do not include the judgment of said Lawrence.

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The defendant, John Isam, set up in his answer that he knew nothing of the transactions between complainant and the defendant Little; that he is informed and believed that the judgments claimed to be held by complainant against said defendant have been paid off and satisfied; that defendant resides in the county of Lowndes, and merely came to Americus to attend the sale of the property levied on under the Lawrence *fi. fa.*, of which he is the owner; that on the day of sale his attorney informed him that the defendant, David A. Mayo, was the owner of a *fi. fa.* against said Little, of the same date as the Lawrence *fi. fa.*, and at the suggestion of his said attorney he went to see S. C. Elam, Esq., the attorney for said Mayo, and it was agreed between defendant and said Mayo that the two lots levied on should bring enough to settle said executions, or they would purchase them together in the proportion that their executions bore to each other; that Lawrence was a man of good standing, but is now dead; that defendant denies all manner of confederation and fraud whatever; that complainant was allowed abundant time, after said sale commenced, to file his claim.

The defendant, N. A. Smith, answered the bill, substantially, as follows: that he, as an attorney at law, brought the suit in favor of Samuel R. Lawrence, against William Sturges, principal, and A. M. Little, security; that the foundation of the suit was a note placed in defendant's hands for collection, by a person named Mann, who was said to be son-in-law of Lawrence; that Little was not interested in said sale otherwise than as a defendant in execution; that defendant paid off the land merely as attorney for Isam and Little.

The answer of W. W. Guerry, Coroner and acting sheriff, states the facts attending the sale, to-wit: that when notified by complainant of his title to the land, he asked complainant's attorney if he was prepared to file a claim; that said attorney responded that he would be if the defendant would give him fifteen minutes, asking at the same time for the execution; that defendant went into the Court-house and fur-

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nished him with the execution, under which the property was being sold; that defendant returned and proceeded with the sale, when complainant's attorney came out of the Court house and asked defendant, if he was going to continue the sale? that defendant responded by asking said attorney, he had the claim ready? that said attorney walked back into the Court-house, and the land was knocked off to the defendant, Smith.

The defendant, David A. Mayo, merely corroborated the answer of John Isam. Affidavits were read in support of the bill and of the answers.

The Chancellor granted the injunction, in accordance with the prayer of the bill, to which ruling defendants excepted and now assign the same as error.

N. A. SMITH; ELAM & HAWKES, for plaintiffs in error

PHIL. COOK; HAWKINS & GUERRY, for defendants.

McCAY, Judge.

We do not think there was any abuse of the discretion granted by law to Judge Clark. It was his duty to look into the whole case, and if, in his judgment, justice required the parties to be kept in *statu quo* until the hearing, to grant the injunction. As to all these parties, except Mayo, there are suspicious circumstances that justify further and closer inquiry; and as the Judge has thought it wise to stop the sale we think it is our duty not to interfere.

In this State there is never any actual taking possession of land in a levy. The entry on the *fi. fa.* by the levying officer is the levy. This is an official assertion by him of appropriation of the land to the plaintiff's judgment. To constitute a levy there must be a seizure by the sheriff. In personal property this is done by taking possession. In this State, though the process used is a *fi. facias*, the usual practice has been for many years, not to take possession, but to make the levy by entry on the *fi. fa.* and give notice

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the person in possession. We are inclined to hold that notice was necessary to make the levy complete; but the language of the Code (section 3595) implies that the levy is made before the notice.

If the entry is the levy, this land was not legally sold. It was not advertised the thirty days required by law after the levy; and even Mayo knew of this. We are not sure he would not be bound to know it, since the levy is a part, and a necessary part, of the authority to sell.

Judgment affirmed.

ABRAHAM EINSTEIN, plaintiff in error, vs. C. T. LATIMER
et al., defendants in error.

Where a creditor applies for letters of administration upon the estate of his deceased debtor, it was error in the Court to exclude notes and mortgage to secure the same, made by the debtor, which were offered in evidence to show the indebtedness, on the ground that no affidavit had been filed of the payment of taxes thereon. (R.)

Caveat. Administration. Relief Act of 1870. Tax-affidavit. Before Judge SESSIONS. Ware Superior Court. March Term, 1872.

For the facts of this case, see the decision.

JOHN C. NICHOLS; GEORGE B. WILLIAMSON, represented
by NEWAN & HARRISON, for plaintiffs in error.

JOHN L. HARRIS, for defendant.

WARNER, Chief Justice.

This case came before the Court below on an appeal from the Court of Ordinary. Einstein applied for letters of administration on the estate of Joseph Hillman, as principal creditor of the intestate. A caveat to the application was filed. On the trial in the Superior Court, the appellant and

the applicant for letters of administration offered in evidence the notes of the intestate and a certified copy of a mortgage from the record, (having accounted for the loss of the original,) for the purpose of showing that he was a creditor of the intestate, which was objected to by the caveators, on ground that no affidavit had been filed that all legal taxes had been paid on the debts, which objection was sustained by the Court and the evidence rejected. Whereupon the applicant excepted.

The rejection of the notes and copy mortgage, when offered in evidence to show the indebtedness of the intestate to the appellant, because there was no affidavit that the taxes thereon had been paid, was manifest error. There was no suit on the notes or mortgage, as contemplated by the Act of 1870, requiring an affidavit of the payment of taxes. The notes and mortgage were offered in evidence to show that the appellant was a creditor of the intestate. There is no authority within our knowledge, that requires an affidavit of the payment of taxes to do that; most certainly the Act of 1870 does not require it.

Let the judgment of the Court below be reversed.

SAMUEL SMITH, plaintiff in error, vs. EDMOND D. EASON, defendant in error.

1. A deed, or bond for titles to a tract of land, by its number in the survey, binds the obligor to make title to the land within the boundaries of such survey, and if a part be sold off before the date of the deed, this is a breach of the bond, nor is this breach excused by the fact that the quantity sold off is small, and the bond describes the number, containing two hundred and two and one-half acres, or less.
2. Proof that the obligee in a bond for titles knew that the obligor was not the owner of the whole of the land described in the bond, is no plea to a plea of a breach, unless it appear that there was a mistake in the description.
3. When the defendant, in a suit at law, sets up a legal defense, and

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plaintiff desires to reply some equitable matter, he may do so, but he must amend his declaration so as to plainly and distinctly set forth such equitable reply.

Warranty. Failure of consideration. Equitable remedy. Pleading. Amendment. Before Judge CLARK. Schley Superior Court. April Term, 1872.

Edmond D. Eason brought complaint against Samuel Smith upon a promissory note for \$1,249, due January 1st, 1871. The defendant pleaded the general issue and partial failure of consideration.

It appeared from the evidence that the note sued on was given as a part of the purchase-money for certain lots of land, and amongst them, lot number two hundred and fifteen; that Eason gave his bond for titles to Smith, obligating himself as follows: "Now should the said Samuel Smith well and truly pay said promissory notes, then the undersigned binds himself to make or cause to be made to said Samuel Smith good and sufficient title in fee simple to lot of land [containing] two hundred and two and one-half acres, more or less, number two hundred fifteen;" that prior to the execution of said bond, plaintiff had sold thirteen acres off the northeast corner of said lot to one John Barker; that defendant had never had possession of said thirteen acres; that the price of the land was eight dollars per acre; that defendant knew of the sale of said thirteen acres to Barker at the time he purchased.

Counsel for defendant requested the Court to charge the jury, "that if plaintiff sold the lot number two hundred and fifteen, and gave a bond for warrantee titles to the whole lot, and had, at that time sold thirteen acres to John Barker, and defendant could not get the same, then defendant was entitled to have a deduction from the price agreed to be paid for said land, whether he knew the thirteen acres had been sold or not, that plaintiff was bound by his warranty."

The Court refused to charge as requested, and charged as follows: "That if he (defendant) knew of it and helped to

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survey it, he was bound by it; that if the amount of the deficiency was only five or six acres, and the parties knew of it and contracted with that view at the time of the purchase and sale, then no abatement of the purchase price should be allowed; that if the amount of the deficiency of the land was much larger, and the defendant did not know of it, that an abatement should be allowed."

A note to the bill of exceptions by the presiding Judge states that the witnesses for the plaintiff did not agree with defendant as to the number of acres short; that plaintiff and two other witnesses swore that there was only about five or six acres in the cut-off.

The jury returned a verdict for the plaintiff. Plaintiff excepts to the refusal of the Court to charge as requested, and to the charge as given, and assigns said refusal and said charge as error.

W. A. HAWKINS, for plaintiff in error.

HUDSON & WALL, for defendant.

McCAY, Judge.

Here was a written contract, by which the plaintiff below agreed to make titles to a certain tract of real estate within certain specified boundaries. The plea is, that the contract has failed; that, in fact, before the bond was made, he had sold a part of the land *within* the boundaries to another person, and that such person was and still is in possession. This is a clear breach of the bond, and the defendant is entitled to *recoup* to the amount of the value of the land sold off.

The reply is, this is a small matter covered by the words "more or less." Were the deficit merely a deficit of land within the boundaries, this might be true. If it were an error in estimate, if the number of acres could be treated as mere description, this rule might apply. But here is a failure of title to a certain fixed area within the boundaries. The land is there—there are acres a plenty—but the vendor does not own them. We do not think the flexibility of the word

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"more or less" can cover such a case. Nor can parol evidence contradict the deed. The fact that the defendant knew the land had been sold is not, of itself, a reply to the express words of the bond. Men often take warranties, knowing of the defects in the title. The very object of the warranty is often to meet known defects. The only way to meet this defense by the rules of the common law was to show fraud in the bond, or perhaps mistake.

We recognize the right of either party in a suit at law, under the Code of this State, to set up equitable rights. The defendant may plead in equity and the plaintiff reply in equity. But the plea must be set forth plainly and distinctly. We have given this subject much consideration, and are of opinion that the same rule is to be applied to the plaintiff. If the defendant sets up a *legal defense*, and the plaintiff has a reply to it not good by the rules of the common law but good in equity, he may reply in this State at law. But he must amend his declaration. The record must show what his reply is. The judgment at law is only conclusive as to *legal rights*. As to equitable rights, the judgment does not conclude, unless they be in fact determined.

We see, therefore, no way of giving effect to this provision of our law, giving such extensive rights at law, and at the same time preventing injustice, but to require the plaintiff who wishes to reply an equitable right to a legal defense, to put his claim upon the record by amending his declaration.

We think the rules of law were not properly applied by the Judge in this case, and that there ought to be a new trial.

Judgment reversed.

R. J. WILSON & COMPANY, plaintiffs in error, vs. A. J. WALKER, defendant in error.

To establish a set-off, the law requires the same evidence as if the defendant had originally sued the plaintiffs on the claim. (R.)

The jury having returned a verdict in favor of the defendant on his

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plea of set-off, and there not being sufficient evidence to create a *facie* liability of the plaintiffs on the same, a new trial was granted. (R.)

3. When cotton is delivered to a railroad agent, consigned to a factor, in their own names, this is not sufficient to charge the consignee with the landlord's portion, though he may have known it to have been one-fourth. (R.)

Set-off. Delivery. Factor. Notice. Before Judge WALKER. Richmond Superior Court. January Term, 1881.

For the facts of this case, see the decision.

L. E. BLECKLEY; JOHN T. SHEWMAKE, for plaintiffs.
error.

A. R. & H. G. WRIGHT, for defendant. The plaintiff must show evident mistake, prejudice or corruption. See 39th Ga. R., 68; *Ibid*, 119, 359, 708, 223; 41st R., 94, 125, 215; 38th, 129; 40th, 115; 42d, 146. C. Although erroneous, not affecting verdict, no ground for a new trial: 41st Ga., 675, 187, 507; 40th, 423; 42d, 244, 609; 32d, 173, 207.

WARNER, Chief Justice.

This was an action brought by the plaintiffs against the defendant on an open account. The defendant pleaded as a set-off to the plaintiffs' demand, eleven bales of cotton alleged to be of the value of \$1,000, which the defendant avers in his plea had been delivered to the plaintiffs by him in the city of Savannah, in the fall or winter of 1880. On the trial of the case, the jury found a verdict for the defendant for the sum of \$447 66. A motion was made for a new trial on the ground that the verdict was contrary to the evidence, and for error in the charge of the Court to the jury, and refusal to charge as requested; which motion for a new trial was overruled by the Court, and the plaintiffs excepted. It appears, from the evidence in the record, that the cotton pleaded as a set-off to the plaintiffs' demand

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made on his plantation in Burke county, which he had rented to his tenants, Walker & Dickinson, for one-fourth of the cotton made thereon. There had been no division of the crop between the defendant and his tenants, but the cotton made on the plantation was delivered to the railroad agent, to be forwarded to the plaintiffs, by Walker & Dickinson, and the question in the case is, whether there is sufficient evidence, under the law, to make the plaintiffs liable to the defendant for his rent cotton, delivered by Walker & Dickinson to the railroad agent to be forwarded to them. To establish the defendants' set-off against the plaintiffs, the law requires the same evidence as if the defendant had sued them as plaintiff for the value of the cotton. The evidence is, that forty bales of cotton were delivered to the railroad agent at Waynesboro by Walker & Dickinson, consigned to Wilson & Wilkinson, Savannah. There is no evidence of the receipt of the cotton by the plaintiffs, or if they had received it, that they knew that one-fourth of it was the property of the defendant. The defendant states that, to the best of his recollection, he notified the plaintiffs of his *intention* to send his rent cotton. William E. Walker, one of the partners of Walker & Dickinson, states that he informed the plaintiffs by letter in the fall, but cannot say at what particular time, that the defendant claimed one-fourth of the cotton for rent. The plaintiffs positively deny, in their evidence, all knowledge that one-fourth of the cotton raised on defendant's plantation in Burke county by Walker & Dickinson, was the property of defendant and deny that any cotton of defendant was ever consigned to them. If there had been sufficient evidence in the case to create a *prima facie* liability of the plaintiffs for the value of the cotton under the law, we should not disturb the verdict, but, in our judgment, there is not. There is no evidence that the plaintiffs ever received the cotton—the delivery of the cotton by Walker & Dickinson to the railroad agent at Waynesboro, consigned to them, without more, is insufficient evidence to charge them with the value of the cotton, even if they had known that one-fourth of the cotton

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raised on the Burke county plantation by Walker & Dixon was the property of the defendant. If the defendant had brought his action against the plaintiffs to recover value of the cotton, he would not have been entitled so under his own evidence in this case, admitting all that proved to be true, and he is in no better condition as defendant, seeking to establish his set-off against the plaintiff's demand, than if he was suing them for the value of the cotton as plaintiff. There is no evidence of the delivery of cotton to the plaintiffs as the property of the defendant, of any sale or appropriation of it or its proceeds by the violation of their duty as bailees or factors, or of their instructions as such; no evidence that any demand was made on them for the cotton or its proceeds. In our opinion, the verdict of the jury, under the defendant's evidence in this case, was contrary to law, and that the Court erred in overruling the motion for a new trial.

Let the judgment of the Court below be reversed.

JOHN WOOD, plaintiff in error, *vs.* THE STATE OF GEORGIA, defendant in error.

1. Burglary is the breaking and entering the dwelling house of another with intent to commit a felony or a larceny, and the indictment must allege such intent. It is not sufficient in an indictment for burglary to allege that the defendant broke, etc., and having so entered did take certain goods.
2. A fatal defect in an indictment cannot be taken advantage of by directing the jury to find a verdict of not guilty. The proper course before verdict is to demur, or after verdict to move in arrest of judgment.
3. A motion for a new trial on the ground that the indictment is defective, though not strictly proper, will be sustained under the practice in this State.

Criminal law. Burglary. Indictment. Practice. New trial. Before Judge CLARK. Sumter Superior Court. Term, 1872.

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Wood was placed on trial on the following indictment: "The grand jurors, sworn, chosen and selected for county of Sumter, to-wit: * * * in the name and of the citizens of Georgia, charge and accuse John and Henry Wood, of the county and State aforesaid, the offense of burglary in the night time, for that the defendants, John Wood and Henry Wood, on the 27th of October, 1870, in the county aforesaid, did then and unlawfully, and with force and arms, break and enter the smoke-house belonging to P. V. Wessers, (the same contiguous to and within the curtilage and protection of dwelling house of the said Wessers,) and after entering the smoke-house did steal therefrom eighty-five pounds of bacon, consisting of sides, to the value of \$18 00, the property of the said Wesser, contrary to the laws of said State, to the good order, peace and dignity thereof."

Defendant pleaded not guilty.

When the case was submitted to the jury, after the witnesses for the State and defendant had been sworn, but before examination commenced, defendant moved to take a verdict of not guilty, upon the following grounds, to-wit:

Because it was not charged in said indictment that burglary was committed in the night time; nor was it stated in said indictment that said burglary was committed day time.

Because said indictment did not charge that said Wood and entered said smoke-house with intent to commit a felony or a larceny.

His motion was overruled by the Court and defendant excepted.

The jury returned a verdict of guilty.

Defendant moved for a new trial upon the following, among other grounds, to-wit:

Because the Court erred in overruling the motion to set aside the verdict of not guilty, after said cause was submitted to the jury.

Because it was not charged in said indictment that

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said defendant John Wood, broke and entered into the house with intent to commit a felony or a larceny.

The motion for a new trial was overruled, and defendant excepted and assigns said decision as error.

JOHN R. WORRILL; JACK BROWN; A. R. BROWN, plaintiffs in error.

HAWKINS and GUERRY; C. F. CRISP, Solicitor General, represented by CHARLES HUDSON, for the State.

McCAY, Judge.

The crime of burglary consists in breaking, etc., with intent to commit a felony. The intent is a material and necessary part of the crime. Breaking into a house is trespass. Stealing from a house is larceny from the house. But to make the offense of burglary there must be a breaking with intent to commit a felony, (now, or larceny). If the crime is complete, though no felony be committed. If the intent is material it is necessary to allege it. It is a necessary ingredient in the offense, and an indictment fails to state the offense of burglary unless the intent of the breaking be set forth. We know no authority for demanding a verdict on a *bad indictment*. Under our law the jury find a verdict from their own judgment, and not by direction of the Judge. We think, too, the practice is a bad one. Perhaps, on a new indictment, the Court might hold the indictment good, and an acquittal on it a bar. Under the present practice the motion for a new trial generally covers ground that would be good in arrest of judgment. And it has long been the practice to include in a motion for a new trial such exceptions as this, and we will not disturb the practice, though strictly a motion in arrest of judgment is the proper mode of getting at such a defect as this. If the indictment is bad, a new trial cannot be had unless the judgment is reversed.

LEWIS SCOFIELD *et al.*, plaintiffs in error, *vs.* **A. M. PERKERSON *et al.***, defendants in error.

MARTIN J. HINTON *et al.*, plaintiffs in error, *vs.* **A. M. PERKERSON *et al.***, defendants in error.

(McCAY, Judge, did not preside in these cases.)

1. On the abolition of the offices of the Western and Atlantic Railroad, the Comptroller General became the proper custodian of the books and records of the road, and the duty of causing the true amount due by defaulting officers of the road to be ascertained devolved upon him.
2. The Legislature has authority to appoint, by resolution, a committee of their own body, as ministerial agents, to audit and state the accounts of the officers and agents of the Western and Atlantic Railroad. Where such statement shows an officer or agent in default, and is transmitted by the committee to the Comptroller General, and he thereupon issues executions against the defaulting officer and his sureties, this Court will presume that he satisfied himself of the correctness of the committee's report by inspection of the books and accounts of the Western and Atlantic Railroad, and adopted it as his own.
3. The Courts will not entertain jurisdiction to enjoin such execution on the ground that there is a suit pending, at the instance of the State, against the defaulting agent and their securities on their bond, or on the ground that the amount for which the agent is a defaulter, was fraudulently used and embezzled by him.

Execution against defaulting officer. Auditing Committee of the General Assembly. Principal and security. Before Judge HOPKINS. Fulton Superior Court. At Chambers, July 23, 1872.

The two cases above stated being identical in their character, were consolidated and heard together. Lewis Schofield and Varney A. Gaskill filed their bill, containing, substantially, the following allegations: That on January 1st, 1870, Foster Blodgett gave his official bond to Rufus B. Bullock, Governor of the State of Georgia, in the sum of \$20,000, conditioned for the faithful performance of the duties of said office as therein enumerated, as superintendent of the Western and Atlantic Railroad, and Hannibal I. Kimball, John Rice, Henry O. Hoyt and your orators, became his securities;

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that at a session of the General Assembly, 1871 and 1872, a committee was appointed by said body to investigate the management of the Western and Atlantic Railroad and its finances, as to the fraudulent use or embezzlement of any funds or property belonging to the State, and for other purposes therein enumerated; that said committee investigated the actings and doings of the said Foster Blodgett and alleges that he has in his hands, unaccounted for, \$23,321 67; that said account, as stated, does not appear to be for the earnings of the Western and Atlantic Railroad, but is predicated upon defalcations arising, if at all, in embezzlements from said road, and do not appear to be the earnings thereof; that said Foster Blodgett, superintendent as aforesaid, never sold at public outcry any iron of said road, or collected any of the proceeds of said sales; that said committee had no authority to make any report whatever to the Comptroller General of said State, authorizing him to issue summary execution against Foster Blodgett and his securities, but was only authorized to report to the Legislature by which it was created; that said committee on May 23d, 1872, made out the annexed account and transmitted the same to Madison Bell, Comptroller General, ordering and directing him to issue execution against Foster Blodgett and his securities for \$20,000 with twenty per cent. per annum thereon from January 1st, 1871; that said Comptroller General, upon the authority aforesaid, on May 29th, 1872, did issue an execution against the said Blodgett, and his securities, for \$20,000 and lawful costs; that A. M. Perkerson, deputy sheriff of the county of Fulton, on June 3d, 1872, levied an execution upon complainant's property; that said deputy sheriff has advertised said property to be sold on the first Tuesday in July next; that immediately after the levy said execution complainants filed their affidavit of illegality to said execution, which said deputy sheriff returned to complainants with the notice that he would disregard the same, a copy of which is hereto attached. Prayer, that said execution be enjoined until the further order of the Court.

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AFFIDAVIT OF ILLEGALITY.

'Deponents say that said *fi. fa.* is proceeding against them gally, and was issued against them illegally on the grounds, wit:

st. Because there is no law of this State authorizing the comptroller General to issue an execution against the superintendent of the Western and Atlantic Railroad.

d. Because there is no law of this State authorizing the comptroller General to issue an execution against the securities of the superintendent of the Western and Atlantic Railroad on his official bond.

l. Because, before the issuing of said execution, no officer said road had caused the true amount due by said superintendent to be ascertained, as required by law; nor had any amount, so ascertained to be due, been transmitted to the comptroller General as earnings of the road; nor had any superintendent of said road, nor had any person or officer amount lawfully authorized, caused the true amount due said Foster Blodgett, as superintendent, to be ascertained and transmitted to the Comptroller General, as earnings of Western and Atlantic Railroad.

h. Because, at the time of issuing said execution, there were no funds in the hands of said Foster Blodgett, as superintendent of the Western and Atlantic Railroad, and for which his sureties on his official bond were liable, unaccounted for.

h. Because, before the issuing of said execution, there was no superintendent of the Western and Atlantic Railroad, and the office of superintendent had been abolished by law.

st. Because, before the issuing of said execution, the said State of Georgia had brought suit in the Superior Court of the county against said Foster Blodgett for all funds and property belonging to the State, alleged to be fraudulently and embezzled by said Foster Blodgett, or wrongfully taken by him to his own use, and upon which issues are pending and undisposed of in said Court, as deponents are advised and believe.

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7th. Because said execution was issued by the Comptroller General upon an account reported to him by a committee of the Legislature, based upon the alleged fraudulent and wrongful conversion of property and funds belonging to the State, by the said Foster Blodgett, to his own use, and upon such an account there is no authority of law for issuing summary execution by said Comptroller General; and for property and funds, so fraudulently embezzled, the securities upon his said bond are not liable.

The second case is that of Martin J. Hinton, James L. Matthewson, H. O. Hoyt and Ephraim Tweedy, as securities of Foster Blodgett as treasurer of the Western and Atlantic Railroad, against said A. M. Perkerson, deputy sheriff *et al.*, containing substantially the same allegations and, the same prayer as the preceding bill. The execution sought to be enjoined by the second bill was for \$25,519 44 and costs.

The Chancellor refused the injunction prayed for, in the following decision :

"This is an application for an injunction. The case stands upon the bill and exhibit.

"The allegations are substantially these : On the 1st of January, 1870, Foster Blodgett gave bond as superintendent of the Western and Atlantic Railroad, and complainants and others became his sureties. Blodgett entered upon the duties of the office, and he continued to be superintendent until the office was abolished. At its session, 1871-2, the Legislature of the State appointed a committee to investigate the management of the road, and the management of its finances. The committee investigated the actings of Blodgett, and allege that he has in his hands unaccounted for \$23,321 97—a copy of the account being exhibited with the bill. It does not appear by the account that the sums mentioned are of the earnings of the road. Nor does it appear to be the true account which has been made up, or caused to have been made up, by the superintendent, but it 'is predicated upon defalcations arising, if at all, in embezzlements from said road, and does not appear to be the earnings thereof,' as superintendent Blodgett

never sold, at public outcry, after advertisement, any of the road, nor received any of the proceeds of such sales. The committee have no authority to make report to the Comptroller General, authorizing him to issue execution against Blodgett and his securities. On the 23d day of May, 1872, the committee made out the account before mentioned, and submitted it to the Comptroller General of the State, ordering him to issue execution against Blodgett and securities for \$20,000, (the penalty of the bond,) with twenty per cent. per annum from January 1st, 1871. That officer, upon that authority, on the 29th of May, 1872, issued an execution against Blodgett and his securities, for \$20,000, and a copy of the execution is exhibited. It was placed in the hands of defendant, who levied it upon the property of complainants. Complainants presented an affidavit of illegality, which the defendant returned with notice that he should disregard it, and proceed to sell. The affidavit of illegality is exhibited as a bill.

The complainants in this bill make a case that entitles them to the interposition of the powers of a Chancellor? Is an appeal to the extraordinary powers of the Court, and the plaintiffs are bound to make out a case showing a necessity for its exercise.

It is important to ascertain what relation Foster Blodgett bears to the State. The Western and Atlantic Railroad is the property, exclusively, of the State. The superintendent was appointed an officer. Before entering on his duties, he gave bond for the security in the sum of \$20,000, and the bond was filed and recorded in the office of the Comptroller General. He has authority to conduct all the operations of the road connected with its repairs, equipment and management, including its financial affairs; to sue, officially, for any claim due to the road on account of said road; to see that the books and accounts of the road were so kept as, at all times, to show fully its official affairs; to sell useless iron, after thirty days notice, for cash or credit; to have weekly settlements with the fiscal agents of the road for all moneys received by

them. Each agent having funds of the road was required to make out, monthly, and sign a statement of his account, and any officer or agent failing to pay over funds collected by him weekly, or failing to furnish the superintendent a monthly statement was to be dismissed by him. When such dismissal took place, an account was to be had at once of all the freight on hand, giving the person dismissed credit therefor, so as to show the amount of his indebtedness.

"Section 996, Revised Code, is this: 'As soon as an officer or any other person having funds of the road unaccounted for is in default, and fails to pay over said funds on demand made by the superintendent, or by his authority, or abscond or conceal himself, or in any other way endeavor to prevent a settlement, said officer shall promptly cause the true amount due by such person to be ascertained and transmit the same to the Comptroller General as earnings of the road, stating also the date of the default.'

"The bonds of all the officers and agents were to be deposited in the Comptroller General's office. All debtors to the State were as debtors to the State or the public, and 'the remedy against the State against the superintendent, the treasurer, and other officers and agents, is the same as against tax collectors or receivers.'

"The net proceeds of the road were to be paid monthly into the State treasury, and were one of the sources from which the State does or may derive revenue other than by taxation.

"From this general statement of the various sections of the Code which are applicable to the matter of inquiry, we may assume, as being incontrovertible, that the superintendent, as the chief officer of the road, had the general management of all its affairs, he had power to receive or disburse money belonging to it, and when so received, it was his duty to pay it to the treasurer, and to have the transactions entered on appropriate books, to be kept for that purpose. That the books and accounts of the road could not, 'at all times, show accurately the fiscal affairs,' if they failed to disclose an

of money that might be in the superintendent's hands. Complainants undertook, in their bond, that Blodgett should have these books kept, and that he should pay into the treasury the money that he received. It is conditioned in the bond, as appears from the statement of the public officer who is charged with its custody, that Blodgett should 'well and truly perform all the duties required of him by law, and well, truly and faithfully account for all moneys and property that might come to his hands, by virtue of his appointment, and do all other acts required of him, in said office, according to law and the trust reposed in him.' It is further indisputable, that, for a failure to do his duty, the State had the same remedy against him, whatever that might be, that it had against tax collectors or receivers. That is the express language of the law. The remedy against a tax collector is an execution from the Comptroller General against him and his sureties for the amount of his default. At this point a question of difficulty arises. How is the Comptroller General to be advised of the amount of the superintendent's indebtedness? As to all the other officers and agents there is no trouble. It was the duty of the superintendent to ascertain and transmit the amount as prescribed by section 996. But that section does not apply to the superintendent. It contemplates, on one side, an agent, or any other person, in default, failing to pay on demand, or evading or preventing a settlement, and, on the other side, the superintendent making the demand, and on failure to get a settlement, ascertaining the amount and transmitting it to the Comptroller General. The superintendent is, in the section, on one side, the collecting side. He may be taken out of that, but the difficulty lies in putting him on the other side. Changing the collecting agent would not enlarge the meaning and scope of the other part of the section. It would remain as before, and if, at the beginning, it did not embrace the superintendent, he could not then be embraced.

"I think it is true that the superintendent undertook to faithfully account for the public money and property; that,

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on his failure to do so, the Comptroller General was required to issue an execution for the amount of the default, and that there was no express provision of law prescribing the mode of informing the Comptroller General of the amount. And thus the law stood when the office of superintendent was abolished.

"It is better to pause here and look more closely into the remedy that the State has. It is precisely that which it has against tax collectors or receivers.

"By section 911 of the Code, 'if any collector shall fail to settle his accounts with the Comptroller General in the terms of the law, he shall issue execution against him and his sureties for the principal amount, with the penalty and costs.' Section 914 is in these words: 'Executions so issued shall not be suspended or delayed by any judicial interference with them, but the Governor may suspend the collection not longer than the next meeting of the General Assembly.'

"This remedy against the superintendent is an execution from the Comptroller General's office against him and his sureties, and when so issued, it cannot be suspended or delayed by any judicial interference with it, but the Governor may suspend it. Such an execution has been issued in this case, and this bill is filed to interfere with and suspend it.

"When the execution is issued by the Comptroller General, and shows on its face jurisdiction of the person and subject matter, has a Judge the power to look into it and determine whether it shall or shall not proceed? If it issues or is proceeding wrongfully, but is, nevertheless, within the jurisdiction, can the judiciary interfere with it, and suspend or delay it? Is the Executive alone entrusted with that power? The complaint in this case is not that the Comptroller General had not jurisdiction of Blodgett and his sureties, and of the subject matter, but that he was moved to the exercise of the jurisdiction improperly.

"It is a principle pervading our system that the State in the collection of its revenue cannot, as a rule, be interfered with. It is the duty of the collectors, without judgment or

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trial, to issue executions against defaulting tax-payers, and section 3618 of the Code reads as follows: 'No replevin shall lie, nor any judicial interference be had, in any levy or distress for taxes under the provisions of this Code, but the party injured shall be left to his proper remedy in any Court of law having jurisdiction thereof.' To force the money from the pocket of the tax-payer, the collector is armed with the power of a process to collect, which, in the language of Judge NISBET, is the highest, in its direct efficacy, known to the usage of constitutional government. With the collection of this revenue there can be no judicial interference, from the making of the demand of the tax-payer until it goes into the State treasury. If the citizen fails to pay, the collector makes him do so; if the collector fails to pay it over after he gets it over, the Comptroller General makes him and his securities do so. It is not because the money arises directly from taxation; there is no peculiar charm in the word taxes, it is because it is a part of the revenue of the State. The principle applies to the public revenue, no matter from what source it arises.

"This statute, on its face, contemplates a case in which wrong may be done to the individual against whom the process runs. It says that the process shall go on, shall do its work without interference, and 'the party injured shall be left to his proper remedy in any Court of law,' etc. Judge NISBET, in *Gledney vs. Deavors*, 8 Georgia Reports, 484, in speaking of the lien of taxes on property, says: 'The State has to have her revenue at all hazards, hence these various stringent provisions of the law to restrain judgment. Prompt collection is as necessary as a lien. * * * * To collect taxes, the State turns, with uncontrollable power, directly and instantaneously upon the property; and if, in the exercise of this stern but necessary attribute of sovereignty, the citizen is injured, his only redress is to petition to the Legislature. In *Eve vs. the State*, 21st Georgia Reports, the Supreme Court, by Judge BENNING, says: 'Whether a claim is to be exacted or not, is a question everywhere, so

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far as I know, for the Executive, not for the judiciary. If the Executive exacts the claim and collects the money and it turns out that the claim was unfounded, the government itself gives redress—sometimes provides a mode by which redress may be obtained through the Courts. In every case, however, the money claimed or tax has first to be paid. If this is not universally true it certainly is generally true.’

“But suppose, although it should appear, as it does in this case, that the Comptroller General has jurisdiction of the person and subject-matter, still the Courts can interfere with the execution, and determine whether that officer proceeded regularly to the exercise of the jurisdiction, that is, that he ascertained the amount in the proper manner. It must be remembered that no complaint is made that the amount claimed is not due from Blodgett. That is not denied in the bill. There is no direct, unequivocal denial of the indebtedness in the affidavit of illegality. Then did the Comptroller General ascertain the amount in a legal manner?

“Execution has been issued. It recites that it is done on the authority of a statement of Blodgett’s account, ascertained and made out by a committee of the Legislature. Complainants in that bill allege a want of authority on the part of the committee to ascertain and report the state of the superintendent’s account. One of the resolutions passed by the Legislature is in these words:

“*Resolved*, etc., That the committee appointed to investigate the management of the Western and Atlantic Railroad be directed to ascertain and state the accounts of the agent and other persons dealing with the Western and Atlantic Railroad and compel settlement of the same, and upon an amount being ascertained as due the Western and Atlantic Railroad, the State Treasurer be authorized to receive and receipt for the same.’

“That committee states an account containing seven items in this manner:

“Mr. Foster Blodgett, superintendent of the Western and Atlantic Railroad, for the year 1870, debtor to the State of

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Georgia, 1870, June 3d, to amount collected of the Scofield Rolling Mill Company, on account of old iron sold them belonging to the Western and Atlantic Railroad.

"Five of them are of a similar character, differing only in amount. Another is for amount collected of the Post Office Department, United States; and the remaining item is 'to amount received of I. P. Harris, Treasurer, etc., of the funds belonging to the Western and Atlantic Railroad, in pass bill seventy-one, July 1870, in the name of J. C. Smith.'

"They transmit this account to the Comptroller General of the State, and certify, 'it is ascertained by the committee of the General Assembly, etc.; that there was due on the 1st day of January, 1871, and is yet due the State of Georgia from Foster Blodgett, superintendent of the Western and Atlantic Railroad, for the year 1870, of the funds of said Western and Atlantic Railroad, in his hands unaccounted for, the sum of \$23,331 67,' on the foregoing statement of account; that said sum was received by the said Foster Blodgett, as superintendent aforesaid, during the year 1870; that said Foster Blodgett absconds and prevents a settlement of said indebtedness. This statement of indebtedness is hereby transmitted to the Comptroller General that execution issue, according to the statute in such case provided, etc.'

"The resolution required two things of the committee: they were first to ascertain the *state of the accounts* of agents and other persons dealing with the road, and second, to compel settlement of the amount ascertained to be due. How were they to ascertain the state of the accounts, and in what manner were they to compel settlement?

The accounts were to be kept on the books of the road—the bill required that. It does not appear from this bill that the committee changed a figure on those books, or that they gave a word of testimony other than that furnished by the books and papers of the road. It is argued that they did. It is said by counsel that *ex parte* examinations of witnesses were made, and that hearsay testimony and unauthorized opin-

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ions were received and acted upon by the committee. It is not for me to inquire what effect, if any, such allegation had it been made, would have had. It has not been made. There is no intimation in the bill of how the committee ascertains the amount. The presumption of law is that it was done rightly and properly, and nothing whatever is alleged to the contrary. The certificate and account disclose nothing more than an ordinary account of a business transaction. There is on the face of these papers no other appearance of fraud than that which may exist in law where one person withholds the money of another.

"How were they to compel settlement? By legal process. Just such means as the law had provided, they were to adopt. They could resort to the Comptroller General's execution or to suit on the official bond. By the Code section 943, the bond of the collector is not to be sued unless some emergency should make it necessary. The execution is the usual remedy and must be employed, unless some emergency makes it necessary to resort to suit on the bond.

"It is said that this is a hard case, and that by suffering this process to run its course, it may do great injustice to complainants.

"The remedy is a severe one, but every citizen of Georgia since the year 1804 has been subject to it. That it is for a large amount, does not affect the principle. The remedy lies with the Executive.

"Complainants have failed in the bill to make a case that entitles them to an injunction." To which ruling plaintiffs in error excepted, and now assign the same as error.

B. H. HILL & SONS; D. F. & W. R. HAMMOND; P. & BROWN; A. B. CULBERSON; GARTRELL & STEPHEN PEEPLES & HOWELL, for plaintiffs in error, submitted the following brief:

I.

1. The resolutions organizing the Western and Atlantic Railroad committee, and defining its duties, did not empow-

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the committee to adjust the account of the superintendent; the first one is confined to the investigation of "frauds and embezzlements," etc., and the second one only authorizes the committee to adjust the accounts of "agents and other persons dealing with the road." Acts 1871-2, pages 257, 329.

1) The terms, "agents and other persons dealing with the road," do not include the superintendent, because such is not the ordinary meaning of the language used: Code, sec. 4; and see Code, sec. 997; Acts 1858, p. 623; Acts 1871-2, p. 53. (b) And because the superior (superintendent) is not included in the inferior (agent:) 1 Blackstone's Com., 88; 5 Wmyn's Digest, 328, 331. (c) And because, this being a proceeding in derogation of common right, every act making part of the system must be strictly construed: 31 Ga., 700, 0; Potter's Dwaris, 146; 18 Ga., 340; 7 Ga., 514, 515; Brock., 520; 5 McLeon, 185; 2 Wh., 203; 4 Wh., 241; Peters, 524, 525-6-7; 2 Dallas, 316; 4 Hill's N. Y., 76; Modem, 283; 9 Bac. Abr., 250; 16 Ga., 111; 33 Ga., 2; 2 Brock., 448, 480, 484.

2. It was not in the power of the Legislature to organize committee with authority to state an account against the superintendent for proceeds of iron at private sale, without advertisement. (a) Old iron must be advertised and sold at public outcry, and if note is taken, it must be deposited with the treasurer: Code, 1008, 1009. (b) Therefore, Blodgett, selling iron at private sale, without advertisement, acted without authority, and was a *tortfeasor*; to ascertain these facts and pronounce the judgment of law upon the same is a judicial question, and not a mere ministerial duty: 34 Ill., 263; 2 Brock., 476, 480, 485, 486; 21 Wend., 218; 3 N. Y., 37; Cooley on Lim., 90, 91, 410. (c) But this legislative committee, not being of the judicial department, cannot perform any judicial function; it can only perform ministerial duties: Code, sec. 5106.

Again, if this legislative committee has power to adjust superintendent's accounts, and compel payment of the same, it must proceed according to the usual modes unless

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expressly authorized to resort to extraordinary remedies for reasons already given.

II.

1. Is the account on which this execution issued the kind of a claim for which it was designed to use *the* process of the Comptroller General? It is not, for the following reasons: (a) It is not for "frauds of the road unaccounted for:" Code 907. (b) Nor is it for the "earnings of the road:" Code 1008-9. (c) Nor is it for moneys in the hands of a duly appointed financial agent of the road, or a designated depository of the funds of the road: 2 Brock, 480-484. (d) This process is designed to be used only against officers or agents of the kind above enumerated *for balances appearing in cash on the face of the books*, that can be stated by a mere ministerial officer or clerk: 2 Brock., 484; 5 Ga., 193; Code, 907, 911.

2. The law under which this execution pretends to proceed cannot be strictly pursued, and therefore the summary remedy cannot be used: Code 996; 9 Ga., 187.

3. But the Code does not give a summary remedy against the *sureties* of the superintendent *in any case*. When an execution issues summarily against a tax collector it issues *also* against his sureties; but when it issues against a tax receiver the sureties are not included. The section providing for summary remedy against the superintendent, auditor, treasurer, etc., of the Western and Atlantic Railroad does not attempt to subject the sureties of these officers to the same process: Code 907, 911, 991; 2 Brock, 481-2; 21 Ga., 55, 56.

4. By the rule of strict construction we are forced to adopt interpretation of the statute which would restrict rather than extend the language used.

5. But if this kind of remedy was ever authorized against the superintendent and his sureties, it cannot be employed now, because recent legislation was intended to substitute new modes of proceeding entirely: Acts 1871-2; pages 72, 253, 256-7, 329. If this was not the legislative purpose

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These recent Acts show that the Legislature considered the summary execution inapplicable to any but plain accounts.

III.

Have complainants the right to resist this summary remedy by illegality or bill? They have for the following reasons:

1. This is not a claim for taxes, nor in the nature of such claim (nor for funds in the hands of a duly appointed financial agent.) The defense is not denied by the Code, section 18.

2. Section 914 of the Code does not attempt to deny the right of judicial interference to any execution except those issued under sections 907 and 911. So that if section 991 or any other law really authorizes this summary remedy against a superintendent and his sureties, it does not undertake to deny the usual defense given by law in other cases against executions issuing or proceeding illegally: Code 914, 907, 1, 915, 991; 3 Mason, 331.

3. But if the law did undertake to deny complainants a hearing in this case before a sale of their property, it would be unconstitutional, because: (a) "No person shall be deprived of life, liberty or property, except by due process of law:" Code 5078; Cooley on Lim., 353; 4 Wh., 244; 1 Kent's Com., 620-1, note; Sedgwick on C. and L. L., 537-9. (b) "The right of trial by jury, *except where it is otherwise provided in the Constitution*, shall remain inviolate:" Code 5207, 5174; 5 Ga., 193. (c) "Legislative Acts in violation of this Constitution, or the Constitution of the United States, are void, and the judiciary shall so declare them:" Code 5107; 27 Ga., 357-8; 42 Ga., 424, 428.

4. Even in cases of distress for taxes the Courts always deny the right to interfere, unless, (a) The proceeding was under the Act of 1804, or under the Code: Code 3618; 27 Ga., 357; 42 Ga., 428; (b) and for taxes exclusively; same authorities and Cooley on Lim., 487-89, 490; (c) and under a law authorizing the proceeding; 27 Ga., 357-8; 42 Ga., 428.

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Conclusions. The Court below should have granted the injunction if either of the following positions is true:

1. If the legislative committee either were not or could not be authorized to adjudicate a claim like the one in question.
2. Or if the statute did not originally authorize this summary remedy against the sureties of a superintendent, or if the law to that effect has been repealed.
3. Or if the right of trial by jury either has not been, or could not be, denied by the Legislature in a case like this.

N. J. HAMMOND, Attorney General; J. T. GLENN, Solicitor General, for defendants, argued as follows:

Bonds of superintendent and treasurer of Western and Atlantic Railroad are deposited with Comptroller General: R. Code, secs. 973, 984.

The Comptroller must "audit the accounts of all agents disbursing public money:" R. Code, sec. 94, p. 13; and "collect all evidences of debt due to the State from any other source than taxes:" R. Code, sec. 94, p. 9. His means of collection is a *fi. fa.*: Sec. 94, p. 6 and 8; sec. 911 (T. C.) and 991, (W. & A. R. R.)

Distress was *common law* remedy for a "debt due to the Crown:" Black. Com., 14; Bacon's Abridg.; Distress G. Comyn's Dig.; Distress, (D. 7.) Recognized by sec. 4 of Act of 1823: Cobb's N. Dig., 1025.

The revenue of the State comes from the Western and Atlantic Railroad earnings: Code, sec. 994, p. 1; and from "the use by individuals of any other property of the State:" Sec. 94, p. 5. Revenue defined: Yancey vs. The N. M. Manufacturing Co., 33 Ga. R., 624. Revenue from the Western and Atlantic Railroad put on footing with taxes: The State vs. Dix, 38 Ga. R., 171.

There can be no judicial interference with the collection of the public revenue. No replevin "for goods seized for a debt due to the king, without command of the king, or of the Barons of the Exchequer:" 7 Comyn's Dig., Replevin D. It is prohibited where county fund ("public fund") was in jeopardy.

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f Judge of Inferior Court: *Tift et al. vs. Griffin*, (Act 1796,) Ga. R., 188, 189, 192; *Eve vs. The State*, 21 Ga. R., 50, 1, 58, 59; (Act of 1804,) *fi. fa.* by Comptroller *vs. T. C. securities*.

Yancey vs. The N. M. Manuf'g Co., 33 Ga. R., 622, tax r indigent widows and orphans of soldiers: R. Code, secs. 91, 914, 3618; see, also, 27 Ga. R., 354; 40th, 133; 42d, 24, 428. Tax receiver's liability: Sec. 907, 922, 913, 914, 15, 916, 943.

The construction of section 991, etc., Revised Code, should be controlled by the Act of 1858, of which they are the codification: See Acts of 1858; R. Code, secs. 914, 3618.

By that Act the construction is "liberal," and so it has ever been to effect the object of collecting public revenue. *Doe, ex dem., Gledney et al. vs. Deavors*, 11 Ga. R., 84-5, "distress," in Act of 1804, construed to mean "execution."

In *Eve vs. The State*, 21 Georgia Reports, 50, see the construction. The 16th and 24th sections of the Act of 1804 authorized the *Treasurer* of the State to issue *fi. fa.* against tax collectors: Cobb's Dig., 1052. The Comptroller General was held competent to issue this *fi. fa.* by considering the 3d section of the Act of 1823, (Cobb's N. Dig., 1025,) as amending said section of Act of 1804. The 24th section of Act of 1804 authorized *fi. fa.* against collector, but was held to cover securities also by construction: *Eve vs. The State*, 21 Ga. R., 50. The Act of 1804 forbade judicial interference with taxes levied under that Act. By construction, it has been applied to all subsequent tax Acts; summary remedy is a necessity. *Tift et al. vs. Griffin*, 5 Ga. R., 190, 191; *Doe, ex dem., Yancey vs. Deavors*, 8 Ga. R., 484; 11 Ga. R., 81-2; *Yancey vs. The N. Manuf'g Co.*, 33 Ga. R., 623. Can the jury interfere with the collection of taxes levied since the Code because the Code only forbids interference with "taxes under the provisions of this Code?" Sec. 3618; see 27 Ga. R., 219.

It is not unconstitutional to allow this summary remedy without a judgment. It was without jury before Constitu-

tion of 1798: Tift *vs.* Griffin, 5 Ga. R., 189-190. So it ever been. The new Constitution, Art. 5, sec. 13, p. says—"The right of trial by jury * * * shall remain inviolate:" 33 Ga., 622; 21 *Ibid.*, 50.

The officers of the Western and Atlantic Railroad abolished by Act of 1871, it was the Comptroller's duty to collect all dues to it. See citations *ante*. His mode of collection is by *fi. fa.* In issuing that he acts *ministerially* only: 5 Ga. R., 193, Tift *vs.* Griffin; 11 Ga. R., 217; *Sett vs.* the Governor, 29th, 157; Justices Inferior Court Hunt *et al.*

However, he finds out the fact that a public officer is a defaulter, the Comptroller must issue *fi. fa.* The resolutions appointing the committee on the Western and Atlantic Railroad make them, in lieu of the superintendent, the proper authority to audit accounts and "compel settlements." Acts of 1871-'72, 257 and 329 Rev. Code, sec. 975, pt. 11, 15.

The State *directly* has no other remedy; she cannot slow process of suit. She may use all remedies; they are but cumulative: Doe *ex dem.*, Gledney *vs.* Deavors, 8 R., 483.

MONTGOMERY, Judge.

1. On December 14th, 1871, the Legislature abolished the offices of the Western and Atlantic Railroad. Before their abolition, as soon as an agent or any other person having charge of the road unaccounted for was in default, and failed to pay over said funds on demand, made by the superintendent or his authority, or absconded, or concealed himself, or in any other way evaded or prevented a settlement, it became the duty of the superintendent promptly to cause the true and due by such person to be ascertained, and transmit the same to the Comptroller General as earnings of the road, and also the date of the default: Code, sec. 996. The duty of the Comptroller General is then pointed out by section 991.

is to issue execution against the defaulter and his sureties, as in case of a defaulting tax collector, etc. It will be perceived by an examination of the sections referred to, and others upon the same subject-matter, that there is no provision made for a report to the Comptroller General of any default by the superintendent himself, and yet section 991 makes it the duty of the Comptroller General to issue execution against the superintendent and his sureties in case of his default, as he must do against any inferior defaulting officer upon report made by the superintendent. Where a duty is imposed upon an officer to be performed upon the happening of a contingency, and no mode is pointed out whereby he is to be officially informed that the contingency has happened, it necessarily is a part of the duty required of him to ascertain the happening of the contingency for himself. Hence, before the Act abolishing the offices of the Western and Atlantic Railroad, upon default made by the superintendent, it became the duty of the Comptroller General to ascertain the amount for which he was a defaulter and issue execution therefor. The abolition of the office of superintendent extended this duty of the Comptroller to all defaulting officers of the road. This being his duty, and no custodian of the books of the road being specially provided by law, they naturally fell into his hands, where all other revenue accounts due to the State are kept: Code sec. 94, p. 9, sec. 95, p. 6.

2. It is insisted that the Legislature had no authority to constitute a committee of their own body a Court to try and determine *ex parte* the liability of the principal of the commitments, and to cause execution to issue against said principal and his sureties. Conceding this to be true, it is clearly competent for the Legislature to appoint a committee of their own as ministerial agents to audit and state the accounts of the officers of the Western and Atlantic Railroad, and to report the result of their investigations to the Legislature. When they do this, and the committee proceed with the investigation and ascertain to their own satisfaction that there has been default, while it may be true that they have

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no power to compel the Comptroller General to issue execution for the amount found to be due by the defaulting officer, yet if they transmit the result of their investigations to the Comptroller General, and he chooses to adopt it as his own after verifying it by the books of the Western and Atlantic Railroad, he does exactly what he is by law required to do, in issuing the execution against the officers found in default and his sureties. For aught that appears, that is what has been done in this case, and the Courts will not presume any irregularity where the case made does not show any to exist. The jurisdiction of person and subject matter by the Comptroller General cannot be seriously questioned: Acts of 1858; Code 991, 911, 907, 943.

If then the Comptroller acted within his jurisdiction, as set forth in the legislative Acts referred to, there can be no judicial interference: Code, 3618, 914. The appeal is to the Governor: *Ibid.*, 914. But it is said the surety is deprived of his constitutional right to trial by jury. The Constitution only provides that the trial by jury shall "remain inviolate;" i. e., remain as it existed before the adoption of the Constitution. As early as December 22d, 1791, it was enacted that "no replevin shall lie, or other judicial interference be had in any levy or distrain for taxes under this law, but that the party injured be left to his proper remedy in a Court of law:" Mar. and Crawford's Dig. 497. And the same Act for the first time provides for the issuing of execution by the Treasurer (now Comptroller General) against defaulting tax collectors and their sureties. These provisions have been retained upon the statute book from that day to this. What was the proximate cause of a denial of judicial interference has been lost by the lapse of time. The sureties of officers against whom these summary remedies are provided must be held to have contracted in reference to the law. Hence, this claim to a right to trial by jury cannot avail them.

Thus far I have considered the case made by the record. The case made in the argument was a very different one.

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is said that the books of the Western and Atlantic Railroad do not show the balances against the superintendent and treasurer for which the executions are issued by the Comptroller General; that the amounts were arrived at by an *ex parte* examination of witnesses, without any opportunity to the parties whose interests are affected to cross-examine or to offer counter-evidence. If the record made this case, I (speaking for myself) should have serious difficulty in assenting to an affirmance of the judgment. This Court has decided that the Comptroller General in issuing executions of the character of those under consideration acts ministerially only: *Tift et al., vs. Griffin*, 5 Ga., 185. The Court say he "has no judicial functions in this regard. There is no issue to try, there is no judgment to be pronounced. As auditors—and the Court underscore the word—it is their business to ascertain the amount due, and then to issue execution."

If the statement in the argument of the case at bar be true, the action of the committee, or the Comptroller, has been very like a judicial act. To permit these summary proceedings in contested cases would be to place in the hands of the Comptroller General a very oppressive engine. It at once transforms him into a judicial officer, with power to hear *ex parte* accusations against any financial agent of the State and his sureties, and to pronounce a judgment from which there is no relief except in the clemency of the Governor and an Act of the Legislature. Chief Justice Marshall has well said, in discussing a similar revenue law of the United States, "I will not attempt to detail the severities and the oppression which may follow in the train of this law, if executed in contested cases. They have been brought into full view by counsel in their arguments, and I will not again present them. It may be said with confidence that the Legislature has not passed any Act which ought, in its construction, to be more strictly confined to its letter:" *ex parte Randolph*, 2 Brock., 480. Again, he says in the same case, "If we take into consideration the character and operation of the act, the extreme severity of its provisions, that it departs

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entirely from the ordinary course of judicial proceeding and prescribes an extreme remedy, which is placed under the absolute control of a mere ministerial officer, that in such a case the ancient established rule is in favor of a strict construction; my own judgment is satisfied that this is the true construction."

Let it be borne in mind, that—again to paraphrase Judge Marshall—it is not the responsibility of these complainants to the State, but their liability to this particular process, which is the subject of inquiry. The Legislature might very reasonably make a distinction, when giving this summary process, between an officer, whose whole liability ought to appear on the books of the Western and Atlantic Railroad, and an agent, whose liability is to be ascertained by extrinsic evidence. "But it is enough for me," adds Judge Marshall, "that the law, in my judgment, makes the distinction." *Ibid.*, 484. In interpreting the language of the Act, Judge Marshall says: "The second section of the Act requires that the account stated by order of the first Comptroller of the treasury 'shall exhibit *truly* the amount due to the United States.' For what purpose was the word *truly* introduced? Surely not to prohibit the officers of the government from exhibiting an account known to be erroneous. Congress could not suspect such an atrocity. Its introduction, then, indicates the idea that this summary process was to be used only when the true amount was certainly known to the department; when the sum of money debited to the officer appeared certain, and either no credits were claimed, or none about which a controversy existed,"—note the similarity of our Code—"and officer (superintendent) shall promptly cause the *true* amount due by such person to be *ascertained*, and transmit the same to the Comptroller General," etc. How ascertained? By the examination of witnesses *ex parte*? I think not. An examination of the duties of the Comptroller General, as set forth in the Code, will, I think, sustain this position. See the Code, from section 92 to 105, both inclusive. Among other things, he is to report, annually, to the Governor, "a

ment of the accounts of all officers and agents disbursing money * * * and the several sums for which they are in default." How is he to ascertain how much they are in default? By summoning witnesses and subjecting them to *ex parte* examination? What form of subpoena would be used to compel their appearance, and what punishment would be inflicted for disobedience to the writ? What officer would execute his processes, and execute his orders of punishment for contempt? What oath would he administer to the witnesses, and how could they be found guilty of perjury if they swore falsely? At best, they could only be convicted of false swearing, and if so convicted, what redress has the victim. Section 1400 of the Code applies only to perjury. Surely the Comptroller General cannot go beyond the proper books of account to ascertain how much is due by a defaulting officer, and then to issue his summary process against him to collect the amount.

I am more inclined to think this is a correct interpretation of the law, from the fact that the denial of judicial interference is an anomaly known only, so far as I have been able to ascertain, to the law of our own State. Certainly it has no warrant in the common law. By the law of England, a writ (or execution) issued in a summary manner against a defaulting fiscal agent of the crown, but he could always in the protection of the Court of Exchequer to try before the Court the truth of his alleged indebtedness, if he denied it. Tidd, in his work on practice, (2d volume, 1072-3,) says: "Having shown the different modes of proceeding for recovery of debts at the instance or for the benefit of the creditor or its debtor, it will next be proper to state the means of instituting such proceedings, either by the defendant or a third person. These means are first by motion or application to the Court to set aside the extent and proceedings under it, for other purposes; secondly, by petition of right; thirdly, by *replevin de droit*; fourthly, by traverse of office; and fifthly, by demurrer. Motions to set aside extents are of two kinds: first, on account of some defect apparent on the face

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of the proceedings; and secondly, on the ground of some objection which does not appear thereon, but must be verified by affidavit. * * * If the motion be decided against the claimant, *he may still plead.* * * * Pleas to extents are either by the defendant, or party against whom the extents issued, or by third persons; and they are of two kinds: first, pleas which go in denial or discharge of the debt, and which can be pleaded only by the defendant, or those claiming under him; and secondly, pleas which do not go to the denial or discharge of the debt, but are pleaded to the extent by third persons, who claim the goods, etc., which have been seized as the defendant's, and which pleas go to the property of the goods, etc., seized under the extent:" 2 Tidd's Pr., 1077. In other words, to use our own legal parlance, the defendant may file an affidavit of illegality, or a third person may put in a claim. If the defendant pleads he is not indebted, "he may give in evidence any matter in denial or discharge of the debt:" *Ibid.*

It is true there could be no replevin of the property seized by the levying officer, but that is a very different matter from allowing the party to come in and put in a defense if he had any; in a word, to invoke judicial interference. This was always allowed, and in cases where it was sought to charge the sureties upon the bond of a fiscal agent the practice was to issue a *scire facias*, calling upon them to show cause why an extent should not issue: Foster's Writ of *Scire Facias*, 330, (73 vol. Law Lib.) And even as against the principal a *scire facias* issued unless an affidavit of danger of loss of the debt was made on behalf of the crown: *Ibid.*, 335; see Bingham on Executions, 228 (13 L. L.) Notwithstanding all these delays in the collection of the British revenue, and which have existed time out of mind, we hear of no serious detriment to the English government arising therefrom. Is not this the reason usually given for our statutory prohibition of judicial interference, that the State cannot afford to be delayed in the collection of her revenue more fanciful than

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No great number of her fiscal agents will be likely to be defaulters at once.

Such, then, as the prohibition of judicial interference to be peculiar to our own State, having no foundation in common law and resting upon no reason satisfactory and in the extended application which is asked for, is not disposed to go beyond what seems to me to be the intent of the Legislature, to-wit: that it should be competent to issue executions for the debts of fiscal officers as they appear from the books in which their accounts are kept. It is true, that since the decision in this case was rendered in accordance with the views here thrown out, and then orally decided from the bench, the bills in these cases were filed and the allegation made that the executions issued were not founded on the book accounts of the Western and North Georgia Railroad, but on the *ex parte* testimony of witnesses in cases again brought before this Court, at the present time a demurrer to the bills—at which time I did not dissent—and the Court held the executions properly issued. In deference to the able Judges, who presided on that occasion, I cannot yield my convictions.

It only remains to add that if these executions were issued by the Comptroller General upon examination of the books of the principal of the complainants, as we must do in the aspect in which the case presents itself before us, there can be no judicial interference for any reason, and even if the reasons alleged for the interference are insufficient.

Judgment affirmed.

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[Judges McCay and Montgomery being disqualified from presiding in the two following cases, the fact was certified to the Governor, who commissioned the Honorable C. D. McCutchen and the Honorable Hugh Buchanan, Judges of the Superior Court, *pro hac vice*, Judges of the Supreme Court.]

L. SCOFIELD *et al.*, plaintiffs in error, *vs.* A. M. PERKERSON, deputy sheriff, defendant in error.

MARTIN J. HINTON *et al.*, plaintiffs in error, *vs.* A. M. PERKERSON, deputy sheriff, *et al.*, defendants in error.

1. The issuing of executions by the Comptroller General, to collect the public revenue due to the State, is the act of the Executive department of the Government; and the Courts have no power to prescribe the kind or sufficiency of the evidence which shall be necessary to authorize the process of execution to issue against defaulting officers or agents, or to restrain that department in pursuing this course. (R.)
2. The remedy against the superintendent and the other officers of the Western and Atlantic Railroad is the same as against tax collectors and receivers. (R.)

Injunction. Execution against public officer. Judicial interference. Constitutional law. Taxes. Before Judge HORTON. Fulton County. At Chambers. October 14th, 1872.

These cases were argued together. The allegations contained in the bills as originally filed will be found substantially set forth in the report of the two preceding cases. The decision of the Chancellor, refusing the injunctions upon the bills as originally presented to him, having been affirmed by the Supreme Court, amendments and an affidavit were filed in each case and second applications made for injunction.

The bill filed by Lewis Scofield and Varney A. Gaskins was amended substantially as follows, to-wit:

Complainants aver that the Committee of the Legislature upon the management and government of the Western and Atlantic Railroad, in making their investigation, heard testimony *ex parte*; that Foster Blodgett and his securities were not present nor invited to be present; that they did not know

when many of the witnesses would be examined, and had no opportunity either in person or by counsel to be present and cross-examine the witnesses sworn before the committee; that they had no opportunity to rebut or to explain the evidence of the witnesses sworn, nor to impeach them, some of whom complainants aver, could have been successfully impeached; that said committee, sitting in their rooms at the capitol, sent for such persons as they wanted and asked them such questions as they pleased; that they did not proceed upon a full and fair investigation, but condemned said Blodgett and his sureties to pay the sum stated in their account, certified to the Comptroller General without a hearing; that when said committee certified to the Comptroller General the account aforesaid and directed said officer to issue execution, there was no investigation nor examination by the Comptroller General into the truth of the matters stated in said committee's report; that said report was not verified by the books and records in the office of the Comptroller General, nor by any other books or records whatsoever; that the Comptroller General did not know or pretend to know whether said report was in any respect true; that he had no opinion and formed no judgment thereon; that he did not satisfy himself of the correctness of the committee's report by inspection of the books and accounts of the Western and Atlantic Railroad; that he did not mean to, and did not, in fact, adopt it as his own; that he did not cause the true amount due by the said superintendent to be ascertained from said books as required by law; that, on the contrary, said Comptroller General, when asked to issue said execution, hesitated, and at first determined not to issue any execution unless directed to do so by his Excellency the Governor, and called at the office of the Governor for orders, and finding the Governor absent, he was assured by one of the Secretaries in the Executive office that an order would be issued by the Governor on his return; that the Comptroller General consulted the Attorney General of the State before issuing the execution, and asked to be informed if it was

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his right or duty to issue it upon the report of said committee alone, and that the Attorney General being very much engaged, and not having time to investigate the question fully, told the Comptroller General to issue the execution, and that if there were any objections to it the defendants *in fi. fa.* might present their objections thereafter.

Complainants further aver that the Comptroller General, after yielding his doubts and scruples as to the issuing of the said execution, refused to issue the same upon his own knowledge, judgment or investigation, but desiring that it should appear (as the truth was) to be issued upon the report of the committee, he required that the execution should recite the report of said committee as the authority for the same; that it was the distinct purpose of the Comptroller General in making said recitals, in his execution, to disclaim all intention, purpose or pretext of acting upon his own judgment, or after making any investigation whatever.

Complainants further aver that the items making up the account certified by the committee to the Comptroller General do not appear on the books, records or papers of the Western and Atlantic Railroad, nor of the Comptroller General's office, but were made up from *ex parte*, oral and written testimony, and that in arriving at said items said committee heard evidence, and found facts therefrom and pronounced judgment thereon as a Court, with the exception that complainants and their principal were not present, nor allowed to be present, nor their side of the case heard, all of which acts and doings of said committee were illegal and void as far as the same were used as the foundation of an execution against complainants.

Complainants aver that the principal item in said account to-wit: the item of \$15,000 for old iron is entirely erroneous and unjust, because the notes given by the Scofield Rolling Mill Company for said sum were paid to the Western and Atlantic Railroad in new iron and in rerolling old iron; the outside of this transaction there is not, and never was, any foundation for said item of \$15,000; that the other items

said account are not on the books of the late superintendent nor on the books of the Western and Atlantic Railroad, nor of the Comptroller General, nor of the Treasurer of the State; that before any execution could issue therefor complainants are entitled to be heard, to introduce testimony, to cross-examine, and, if necessary, to impeach the witnesses against them; that complainants, in good faith, deny the fairness and truth of all of the items of said account, and desire to have the same fairly and correctly adjudicated in the courts of the country.

Complainants aver that when their application for injunction was made upon their original bill some of the facts foresaid were not stated, because unknown to them, and there were not deemed material until the decision of the court thereon; that they did not know the circumstances under which the Comptroller General acted in issuing the execution, nor that the books and records of the Western and Atlantic Railroad and of the Comptroller General's and Treasurer's offices did not show said account to be true; that they did not know upon whose testimony nor upon what facts said accounts were based.

Complainants aver that if said execution is allowed to proceed they will be without remedy at law, because said Perkerson will not be liable as a trespasser; they cannot be reimbursed out of the bond of the Comptroller General, because they are advised that they have no right to sue on the bond of the Comptroller General (which is only for \$20,000,) to recover damages for a trespass like the one with which complainants are threatened, and if entitled to an action on the bond there are other parties whose bill is filed in this case, whose claim on the bond added to complainants' will be more than double the penal sum of said bond; that the Comptroller General has but little taxable property in his hands, his whole estate being, according to the tax books, about \$10,000, out of which a homestead of \$3,000 in value may be reserved, and that in case of death his estate

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would be subject to a claim for dower and year's support for his family.

Complainants, submitting the facts aforesaid in addition to those contained in their original bill, renew their prayer for injunction heretofore made, and pray that the same may now be granted.

The defendant showed for cause why the injunction should not be granted, the following reasons, accompanied by the affidavit of the Honorable Milton A. Candler.

1st. Said bill is defective because H. I. Kimball, John Rice and H. O. Hoyt, the other defendants to the *fi. fa.*, are not parties to said bill.

2d. Because said Comptroller General is not a party to said bill.

3d. Because by reason of the refusal of the former injunction this matter is *res adjudicata*.

4th. Because if not *res adjudicata* no sufficient reason is given for not having made the bill perfect in the beginning, nor any sufficient excuse given for the ignorance of the pretended newly discovered facts.

5th. If allowed at all it can be only as to the \$15,000 item, because there is no denial of the justness of the other claims.

6th. Because this *fi. fa.* is a proceeding to recover part of the State's revenue from the securities of one of its bonded monetary officers, and there can be no judicial interference therewith.

7th. There is no denial as to part of the items. If there is any remedy at the hands of a Court, illegality is that remedy, and in illegality all not denied must be paid.

"GEORGIA—FULTON COUNTY.

Personally appeared before the attesting officer in and said county, Milton A. Candler, who being duly sworn, poses and says, he was and is the chairman of the joint committee of the General Assembly, upon the management of the Western and Atlantic Railroad; the \$15,000 item

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the account against Blodgett as superintendent of said road was made up from the following evidence, that is, the evidence touching the matter in pages 90, 92, 94, 95 and 98 of the evidence taken before said committee and published by order of the General Assembly, together with pass-bills of the Western and Atlantic Railroad, and receipts of the Rolling Mill Company, and the books of the treasurer of the Western and Atlantic Railroad. From the treasurer's books it appeared that the iron delivered after the making of said note was paid for in cash out of the Western and Atlantic Railroad treasury, and not by said note, and the books of the treasurer did not show that said note was ever in the hands of the treasurer, and the treasurer's books corresponded with the said pass-bills and receipts, and the auditor's books also showed said amounts audited to said Scofield Rolling Mill Company. Lewis Scofield, defendant, was president of said company, and is the same person examined before said committee. The book-keeper of the committee is absent from the city, and it may be that some pages in said printed evidence on this subject are unintentionally omitted. But the opponent believes none are omitted. But it is well to observe that said printed evidence is the oral evidence taken before the committee, with an occasional paper copy, as shown in this instance, the great body of the evidence, books, pass-bills, &c., are not published. The above is intended to show only the manner of arriving at the correct sums, and not to demonstrate the correctness of said conclusions.

Signed,)

"MILTON A. CANDLER."

Sworn to and subscribed before

this 11th of October, 1872.

Signed) "W. M. BUTT, J. P."

The bill filed by Martin J. Hinton, Henry O. Hoyt, James M. Johnson and Ephriam Tweedy was amended, substantiating the bill of Lewis Scofield *et al.* Madison Bell, the Controller General, was made a party defendant. Substantiating the same cause was shown why an injunction should

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not issue, accompanied by the following affidavit from the Honorable Milton A. Candler :

“GEORGIA—FULTON COUNTY :

“Personally appeared before me, the attesting officer, in and for said county, Milton A. Candler, who being duly sworn, deposeth and says, that he was, and still is, the chairman of the committee on the management of the Western and Atlantic Railroad; that said committee did, before it sat, publish a notice of its intended sitting and its purposes, as stated in the resolution appointing them; this was published in the ‘Atlanta Constitution’ on the 14th of December, 1871, and until the 3d of January, 1872, the day the committee began its sittings. Upon its sitting, subpoenas were served upon the officers of the Western and Atlantic Railroad, requiring them to produce such books and papers of the Western and Atlantic Railroad which they might have. Foster Blodgett was so served and, in response, came before the committee and produced certain papers, and knew the objects of the sittings of the committee, and was in Atlanta for some time while the committee was sitting. He testified before the committee about some other matter. Neither of said complainants, (Hinton and Mathewson,) nor their said attorneys, either before or since the issuing of said *fi. fa.*, applied to said committee for an inspection of any books or papers. Said Hinton was summoned before said committee as a witness, and gave evidence to a matter different from this. Hinton resided in Atlanta all the time, and Mathewson resided in Fulton county. After demand, but before *fi. fa.* was issued, said Hinton showed to deponent a letter, which he said he had received from Foster Blodgett, in which all the items of said exhibit were commented upon, in which Blodgett admitted the correctness of the items as to the post office money, \$2,893 57, and undertook to explain away the other items. The account is made up partly by an examination of the books of the Western and Atlantic Railroad, and from pass bills and other papers and extraneous evidence taken before

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the committee. For instance, in Foster Blodgett's own handwriting, on his own treasurer's book, he was debited as follows: W. L. Avery, for purchase of engine New York, 3500, and then the figures erased, making it appear thus, ———. This looking suspicious, we examined into the matter and ascertained that A. S. Finney, disbursing agent of the Brunswick and Albany Railroad Company, for the engine New York, drew a draft on W. L. Avery, and that Blodgett received the money on said draft and never charged it to himself, except in the suspicious manner above stated, and then erased the figures; the Western and Atlantic Railroad did not use such an engine, and it was sold to the Brunswick and Albany Railroad Company. It is true that said indebtedness was not taken from the books, but is ascertained from what does appear upon the books, and evidence taken outside of the books and papers of the Western and Atlantic Railroad, such as pass-bills, etc. For instance, in said letter of Blodgett, he explained the items by saying he had paid out the money for them, but the books and pass-bills show that he paid for them out of the treasury, and not out of funds in his hands, and receiving credit, as treasurer, for these payments, without having ever charged himself with the receipt of said funds. The book-keeper of the committee being absent from the meeting, it may be that some pass-bills and papers are omitted in the affidavit which bear on these questions. This is intended to show only the manner of getting at the facts, and not the correctness of the conclusions. In all cases, every person was named whom we had reason to believe knew anything about the facts. It is proper to observe that, with slight exceptions, the printed evidence contains none of the evidence which the oral evidence taken down.

(Signed)

"MILTON A. CANDLER.

Subscribed and sworn to before me this

25th, 1872.

(Signed)

"W. H. PATTERSON, Notary Public."

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The Chancellor refused an injunction in each of the aforesaid cases, and complainants excepted and assign said rulings as error.

B. H. HILL & SONS; D. F. & W. R. HAMMOND; GAPTRELL & STEPHENS; PEEPLES & HOWELL; A. B. CULBERSON, for plaintiffs in error.

N. J. HAMMOND, Attorney General; J. T. GLENN, Solicitor General, for defendants.

WARNER, Chief Justice.

When these cases were before this Court during the present term, it was held and decided, "that on the abolition of the offices of the Western and Atlantic Railroad, the Comptroller General became the proper custodian of the books and records of the road, and the duty of causing the true amount due by defaulting officers of the road to be ascertained, devolved upon him; that the Legislature has authority to appoint a committee of their own body, as ministerial agents, to audit and state the accounts of the officers and agents of the Western and Atlantic Railroad. Where such statement shows an officer or agent in default, and is transmitted by the committee to the Comptroller General, and he thereupon issues executions against the defaulting officer and his sureties, the Court will presume that he satisfied himself of the correctness of the committee's report by inspection of the books and accounts of the Western and Atlantic Railroad, and adopted it as his own; that the Courts will not entertain jurisdiction to enjoin such execution on the ground that there is a suit pending at the instance of the State against the defaulting agent and their securities on their bond, or on the ground that the amount for which the agent is a defaulter was fraudulently used and embezzled by him. After the judgment of this Court had been rendered, the complainants amended their bills and again applied for injunctions to restrain the execution of the executions issued by the Comptroller General.

which were refused by the Court, and the complainants excepted.

The averments in the amended bills go behind the issuing of the executions by the Comptroller General and relate to matters which transpired prior to his action in issuing them for the purpose of attacking the validity thereof, and one of the complainants alleges that a part of one of the executions is not due. The issuing of the executions by the Comptroller General to collect the public revenue due to the State, was the act of the Executive department of the State government, and the Courts have no power or authority to compel that department, by *mandamus* or other judicial process, to issue executions for the collection of the public revenue of the State, or to *restrain* that department of the government from doing so, or to prescribe the kind or sufficiency of the evidence which shall be necessary to authorize it to issue such executions against the defaulting officers and agents of the government—that is a matter which belongs to the Executive department of the government, exclusively. All debtors of the Western and Atlantic Railroad were debtors to the State or public: Code, 981. The remedy against the superintendent and other officers of the road is the same as against tax collectors or receivers: Code, 991.

The Act of 1858, from which the provisions in the Code are taken, is still more explicit upon this point. The 7th section of that Act declares, “that debtors to said road shall stand upon the same footing, as to liability and accountability, as collectors of taxes are now liable by law, and no judicial interference shall be had, held or entertained to stop or suspend the collection of a *fi. fa.*, when issued according to the terms and provisions of this Act. But the Governor, for the time being, may and shall, upon affidavit filed as to the amount really due, upon affiant fully paying the sum admitted to be due, stating all the facts in his affidavit, and therein showing why he has paid all that is really due, to suspend the collection of the residue until the meeting of the next legislature, to whom he shall submit the matter for their ac-

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tion." The 6th section of the Act provides for the executions against the defaulting officers of the road by the Comptroller General. The 8th section of that Act declares "that it shall be *liberally* construed to effect prompt accountability and payment from debtors of the road." The 9th section of the Code declares that, "all laws heretofore enacted having a special or local application to said road, and in force at the time of the adoption of this Code, are kept in force unless herein repealed expressly, or by implication."

Can any one doubt that it was the clear and manifest intention of the Legislature that there should not be any judicial interference with the collection of claims due the State by the defaulting officers of the road? But it is said if there is not judicial interference, the complainants will be remediless. The 7th section of the Act before cited points out the remedy, which negatives the idea that it was to be by judicial interference. The principle is, that the State must collect her revenue for the support of government through the action of the Executive department thereof, whether derived from her or from her other sources of revenue, without any judicial interference therewith. The Courts will not presume that the State, in the exercise of her sovereign prerogative in the collection of her revenue, will do injustice to any of her citizens for her own benefit. The complainants, at the time they signed the official bonds of their principal, must be presumed to have done so with a full knowledge of the law applicable to their liability thereon, and as to the manner of its enforcement against them for the default of their principal. The issuing of the executions by the Comptroller General in this case being the act of the Executive department of the government, having the exclusive jurisdiction over that matter, the Courts have no legal right, judicially, to interfere with the exercise of that jurisdiction, for the reasons alleged, either in the original bills of the complainants or in their amended bills, but, on the contrary, are expressly prohibited from doing so. Let the judgment of the Court be affirmed in both cases.

JOHN ANDERSON, plaintiff in error, vs. MOSES P. GREEN,
executor, defendant in error.

Where a verdict is plain and unmistakable in its terms and legal effect, it is error in the Court to permit counsel for the party against whom the verdict is rendered to interrogate the jury, on the reading of the verdict by the Clerk, as to what they intended by their verdict. The verdict in such a case not being ambiguous must speak for itself.

Where a legatee files a bill against the executor of the will under which the complainant claims, to compel the payment of his legacy and the executor sets up the defense of *plene administravit præter*, which is controverted by the complainant and the jury found the following verdict: "We the jury find the sum of \$5,000, with legal interest thereon, from the 24th day of November, 1855, for the complainant, John Anderson, to be raised out of the estate of A. H. Anderson, deceased, in the hands of Moses P. Green, executor," the complainant is entitled to a judgment *de bonis testatoris et si non de bonis propriis*. The decree of the Chancellor should conform to the verdict. Where a decree was rendered by the Chancellor not conforming to the verdict and pending a motion by defendant for a new trial, complainant excepted to the decree rendered and brought the case to this Court, where the bill of exceptions was dismissed, as prematurely sued out, and at the hearing of the motion for a new trial, complainant again moved to reform the decree, so as to make it accord with the verdict, which motion to reform the Chancellor again entertained and overruled, and also granted the new trial, to all of which complainant excepted within the thirty days required by the statute, he is not estopped from assigning error upon the ruling of the Chancellor refusing to reform the decree.

Where the verdict of the jury is for a sum not more than the evidence shows the complainant is entitled to, a new trial will not be granted because they may have arrived at the result by an erroneous calculation—conceding that in this case the mode of calculation adopted by the jury was erroneous.

It is not error in the Court to refuse to strike from a panel of twenty-four jurors a juror somewhat deaf, at the instance of defendant, who himself struck the juror in selecting a jury, and from which refusal no damage is shown to have resulted to the defendant.

That there was a substitute for the juror selected by the parties, who answered to the name of his principal, is no ground for new trial, it not appearing that both substitute and principal were unknown to defendant and his own counsel.

We find no error in the verdict.

A portion of an answer which is not responsive to the bill is not evidence for the defendant.

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9. Probate of a will in common form unattacked for seven years, is conclusive, upon all parties in interest, except minor heirs-at-law.
10. A legatee is not barred from asserting his claim to a legacy against the executor where suit is brought within ten years after the legatee arrives at age.
11. Where a will has been proved in common form for more than seven years, a legatee does not waive the estoppel thereby created by filing his bill against the executor for an account and discovery.
12. Where the verdict is in no view for more than the complainant is entitled to recover, an immaterial charge as to one item claimed in the bill is no ground for a new trial, even conceding such charge to be erroneous.
13. An executor who, by the will of his testator (probated in 1853, and by which a solvent estate of more than \$200,000 is committed to his hands), is directed to move a slave to a free State, to be there manumitted, and to invest for such manumitted slave, on his arrival at age, which occurs in 1862, \$3,000, cannot, after refusing to execute the bequest of his testator until the close of the war, free himself from liability by showing that the estate has perished on his hands from the results of the war and other causes.
14. A provision in a will probated in 1853, directing a slave to be sent to a free State and there manumitted and provided for, was not in violation of the law of Georgia at that time.
15. The law presumes a testator, in making his will, to have had a legal intention in view until the contrary is shown.
16. If an executor buy land of his testator at his own sale, the purchase is voidable at the election of a legatee.
17. Where an executor relies on the defense of *plene administravit*, it is not error in the Court to charge the jury "if you find from the evidence there has been no full and complete administration of the assets of the estate, then this plea of defendants fails, and your verdict may also be against the assets in his hands to be administered, or in default of such assets, against his personal goods."
18. The executor in this case, having made himself personally liable by his neglect for the payment of complainant's legacy, before any law existed authorizing him to invest in Confederate securities without the order of Court, the charge complained of in the 33d ground for new trial is immaterial.
19. An executor, who has willfully or negligently mismanaged the property in his charge to the injury of a legatee, cannot avail himself of the provisions of the Relief Act of October 13th, 1870, when such legatee.
20. That the name of one of the persons who tried the case is not on the jury list of the county, as made up in conformity to the Act of the General Assembly of February 15th, 1865, is an objection proper.

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fectum, and comes too late after verdict, though the party objecting did not know the fact until after the trial. 40 Ga. 253.

21. Jurors cannot be heard to impeach their verdict.

Verdict. Practice. Decree. *Plene administravit præter*. Juror. Probate. Statute of limitations. Estoppel. Immaterial error. Manumission. Presumption. Purchase by executor. Relief law. Before Judge GIBSON. Burke Superior Court. May Term, 1871.

John Anderson filed his bill against Moses P. Green, as executor of Augustus H. Anderson, deceased, making the following case: Augustus H. Anderson died in the year 1863 testate, leaving a large estate of realty and personalty. The sixth and seventh items of his will were as follows, to wit:

"Item 6th. I desire and direct that my executors cause to be removed to a free State and there emancipated, John, son of my negro woman slave, Louisa; that they pay the expenses of such removal, and for the reasonable support and schooling of said John until he is put to a trade, and that when, if he do reach the age of twenty one years, they invest and secure for his benefit, as they may deem best, the sum of \$2,000, to be raised out of my estate."

"Item 7th. I desire and direct that my negro slave Louisa, mother of said John, shall be kept at my Burke plantation until January 1st, 1875, that she be kindly treated and provided for; that she be employed as a seamstress as herebefore, and that she be paid by my executors, annually, until that time, the sum of \$50. If she choose then, in 1875, to go to a free State and be emancipated, my executors are directed to carry out her determination, and to invest and secure for her use as they may think best, the sum of \$2,000, to be raised out of my estate, the interest of which she is to receive during life, and then her son John, if in life, is to have the benefit of said investment absolutely. If said slave Louisa shall determine not to go to a free State then I give her my son-in-law, Moses P. Green, if in life, or if not, to any

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one of the children or descendants of my daughter Martha that said slave may select as her owner."

The will was admitted to probate on May 7th, 1853, and Moses P. Green qualified as executor. At November Term 1855 of Burke Superior Court, a decree was rendered upon said will, at the instance of the legatees, containing the following provisions, to wit:

"That said defendant, under the direction of Thomas M. Berrien and Andrew J. Miller, solicitors in this case, make such provision and investment for the slaves John, Adam, Mariah and Louisa, and such disposition of any of them as will substantially carry out the provisions of said will in relation to them."

"That said defendant proceed to sell all the lands of said deceased in the county of Burke, and all the negro slaves thereon, Adam, Mariah, John and Louisa excepted, at any time or times, place or places, upon such public notice and upon such terms as he may agree on with said solicitors, and that after paying all debts, legacies, the solicitors' fees and Court costs in the suit, and making the investments provided in this decree, the residue of the proceeds of such sale shall be invested by the defendant under the direction of said solicitors in State stocks, or other stocks or securities, for the use and purposes specified in the will of said deceased. That said defendant report annually to this Court his action under this decree, and that the further aid and direction of the Court be given if necessary from any cause or difficulty in carrying out the same."

The complainant, who was the slave referred to as John in said will and decree, became twenty one years of age on the day of February, 1862, and his mother Louisa died in 1858 or 1859. The defendant made sales of the property of the estate to the amount of \$109,000, made no investment of the funds as required by the decree, and has made no returns to the Court. The defendant bought in most, if not all of the real estate and now holds the same, to-wit: the "House tract" containing three thousand six hundred

and eighty-seven acres, the "Eighty-three Station tract" containing one thousand five hundred and one acres, and the "Nesbit tract" containing acres.

The defendant had failed to pay the legacies to complainant or to his mother, and had failed to make any provision for the execution of the bequest in the bill as to them. He had also failed to carry out the provisions of the decree of 1855 as to them. The bill prayed that the defendant be required to pay to complainant the legacies to him and to his mother, with the accumulated interest thereon, and also for discovery. The answer denied that it was the intention of the testator that the bequest in favor of complainant should be carried out literally, as expressed in said will; that defendant had always claimed complainant as his slave until he was emancipated at the close of the late war; that testator intended that complainant, who was then of tender years, should remain with his mother until the time when, by the terms of said will, she was permitted to exercise her choice whether she would go to a free State herself, or remain, he believing, from her expressed opposition, she would never consent to go; that then, if said Louisa decided not to go to such free State, the complainant and his said mother were to remain in this State, under the protection of defendant, be free and enjoy the bequests, so far as it was possible for them to do; that, in the meantime, testator desired that complainant and his mother should be as free as defendant could make them, without endangering their safety, under the laws then of force; that testator expressed his secret wishes and instructions respecting complainant and his mother repeatedly, both before and after the execution of the will, and earnestly and solemnly enjoined upon this defendant the special trust and confidence that he would execute the same, so far as they were concerned, not as therein directed, but according to his wishes and intentions so expressed to this defendant; that defendant paid to Louisa, annually, the sum directed by said will; that the 6th and 7th items of said will were void, as contrary to the public policy of the State; that, inasmuch as Louisa died

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at the time set forth in the bill, the contingency upon which she was to have and receive the legacy of \$2,000 never happened, and therefore complainant acquired no interest in the same; that the sale under said decree was made, as charged, for the sum mentioned, but only a portion of said sale was for cash, and the remainder on a credit of one and two years, and that all the funds collected were expended in the payment of the debts of the deceased, except a part of the credit proceeds, which was invested by him in notes, mortgages and judgments, for the benefit of the estate, and a part of which is now in his hands, in shape of Confederate bonds; that defendant did purchase some of the property sold, through another, and is now in possession of the same, but that the full market value was paid for all property thus bought by him; that defendant made his annual returns to the Court of Ordinary of Burke county regularly until the year 1859, after which time, receiving nothing on account of said estate, the returns were discontinued; that, as executor of deceased, he has fully administered all and singular the goods and chattels, rights, credits and effects which were of the estate of the said Augustus H. Anderson, deceased, at the time of his death, and which came to the hands of defendant to be administered. That there is now due by said estate a trust debt in favor of Augustus H. Anderson, in right of his wife, Susan J. Anderson, amounting, originally, to \$....., which has been reduced, by payments, to \$.....; that, by the 8th item of said will, testator bequeathed to defendant the privilege of using, free from charge, all the lands loaned to him by testator in his lifetime, until January 1st, 1874, and that, by the decree of 1855, defendant was allowed to retain, for his own use, such sum as should, in the opinion of the solicitors named, be a sufficient consideration for the release of the privilege bequeathed to him; that defendant made such release, but said solicitors failed to make the said estimate; that said lands were of the value of \$20,000 at the date of said decree, and of the yearly value of \$2,000 making, for the twenty years intervening between the date

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mid decree and the year 1875, the sum of \$40,000, besides interest due to this defendant for the release aforesaid.

That defendant denies that he owns the "Nesbit tract" of land as charged.

That if complainant be entitled to a decree for any amount, defendant prays that it may be taken against the assets of the estate remaining in his hands as executor; that said decree may be taken subject to the aforesaid trust debt of Augustus H. Anderson, in right of his wife, Susan J. Anderson; that if the aforesaid assets may prove insufficient, that the legacy in favor of the complainant may abate *pro rata* with that of this defendant.

The evidence is unnecessary to an understanding of the questions of law passed upon by the Court, as the facts of the case are fully reported in the bill, answer and motion for a new trial.

The jury returned the following verdict: "We, the jury, find the sum of \$5,000 with legal interest thereon from the 24th day of November, 1855, for the complainant, John Anderson, to be raised out of the estate of A. H. Anderson, deceased, in the hands of M. P. Green, executor."

Upon this verdict the Court entered the following decree: "Whereupon it is considered, adjudged and decreed that the complainant, John Anderson, do recover from the assets of the estate of A. H. Anderson, as shown to be in the hands and control of Moses P. Green, the executor, by his plea and answer filed in the above cause, unadministered, the sum of \$5,000 with legal interest thereon from the 24th day of November, 1855, until the same is fully paid, said interest to be computed as the Code designates for debts of this character; and as the exigencies of this case seem to demand, for the purpose of securing, if possible, the payment of said sum, and to fully protect the respondent from the future liability for said verdict;

"It is further ordered and decreed that said Moses P. Green do turn over and assign to S. A. Corker, as receiver of this Court, all of said assets shown by said answers and pleas to

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be in his hands, within ten days from the adjournment of said Court, by him to be collected and appropriated to the payment of said verdict and decree, or as may be hereafter otherwise ordered by the Superior Court of Burke county; upon the turning over and assigning of said assets by said respondent to S. A. Corker, it is further ordered that said Stephen A. Corker do give to said Moses P. Green a receipt in full discharge of all further liability therefor."

The defendant moved for a new trial upon the following grounds, and others to the number of thirty-seven, all embraced in those herein set forth, to-wit:

1st. Because the Court erred in requiring the defendant to strike from a panel of twenty-four jurors, one of whom was John P. C. Whitehead, said juror stating that he was deaf and unable to hear the evidence or anything that transpired in the Court; defendant requesting the Court to have another juror substituted in his place, which request the Court refused, thus necessitating defendant to strike him.

2d. Because Allen Boyd served as a juror throughout the trial of the cause when he had not been selected by either party as a juror, said Boyd answering to the name of John F. Elliott, who was selected by the counsel of both parties to try the cause, which fact was unknown to defendant or his counsel until the trial was at an end.

3d. Because said verdict is contrary to evidence and the principles of justice and equity.

4th. Because said verdict is contrary to the law and the evidence, for that the jury included in said verdict the legacy of \$2,000 claimed for Louisa, mother of complainant, under the seventh item of the will of the testator, when the undisputed proof was that said Louisa died long anterior to the time when she was to make her election to go to a free State, it being a legacy entirely dependent upon her election in the year 1875 to go to a free State.

5th. Because the Court erred in excluding as evidence that portion of defendant's answer which relates to the

not trust imposed upon defendant by the testator, as not responsive to the bill.

6th. Because said verdict is contrary to the following charges of the Court, to-wit:

"If you believe from the evidence that there was a secret trust created by the testator in favor of the complainant and his mother, Louisa, under the 6th and 7th items of the will of Augustus H. Anderson, in violation of the laws of the State, existing at the time, in regard to the manumission of slaves, said items of the will are null and void, and the complainants cannot recover the legacies and bequests therein mentioned, and the verdict should be for the defendant.

"Parol testimony, or the evidence of the witnesses upon the stand, is admissible to prove the execution of a secret trust, having for its object the manumission of John and Louisa, in the State of Georgia, and the jury is permitted to consider such evidence, and if satisfied therefrom that such secret trust existed in violation of law, they should find for the defendant.

"Gifts of property or money to a slave, under the laws of Georgia, existing at the time when this will took effect, are void, and cannot confer any right upon such slave, either to hold or receive said property or money, or to maintain a suit therefor.

"The emancipation of slaves, as the result of the late war, does not and cannot confer upon persons of color any rights as slaves which they did not possess prior to their emancipation.

"The question of the existence of a secret trust, as relied upon by the defendant in this case, has never been adjudicated, either on the probate of the will before the Court of Ordinary, or by the decree of 1855, and defendant is not stopped by either of said proceedings from setting up the same.

"Estoppels, to be binding, must be mutual, and if a judgment is relied on, it must appear that the judgment was between the same parties, was in relation to the same subject

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matter, that the identical point has been decided, and that the decision was by a Court of competent jurisdiction.

"The statute of limitations does not run against any person until there is an assertion of an adverse right or claim on the part of the person claiming the benefit of the statute, and as complainant did not and could not have made his claim against the defendant until emancipation, the statute of limitations is not operative in this case against the defendant, and he is not barred thereby from setting up in his behalf the secret trust upon which he relies, or any other good and legal defense to the demand of the complainant.

"A will, originally void, cannot be cured by the statute of limitations, and if the jury believe from the evidence that the secret trust existed, as claimed by the respondent, the 6th and 7th items of this will were not only void at the time the will took effect, but they are still void and of no effect.

"The general principle of law is, that all just debts due by deceased or his estate must first be paid before legacies, the maxim being that a man must be just before he is liberal.

"If, from the evidence, you believe that Green, executor, managed the estate as a prudent man would manage his own business, and in good faith, and that the assets were good and solvent at the time he received them, and that he made investments under the advice of his solicitors named in the decree, he cannot be charged with personal responsibility by reason of said assets being now insolvent.

"The administrator may exercise his discretion in demanding cash or extending credit. Full notice should be given and the best interest of the estate observed. If credit is given, the administrator must, at his own risk, determine the sufficiency of the security given. If the security taken is ample at the time, and, subsequently, the debt is lost, although the utmost diligence by the administrator, he will not be responsible for the amount."

7th. Because the Court erred in modifying and adding the following written requests to charge of defendant:

"The validity of the 6th and 7th items of the will

be determined by the laws existing when it took effect, and not the laws as they now exist. If void then, it is void now, and the fact of emancipation and the changed condition of persons of color cannot avail the complainant in this case." To which the Court made the following addition, to-wit: "but the Court has doubts whether this is the law."

"The defendant is not estopped by the probate of the will before the Court of Ordinary, nor by the decree of 1855, from setting up a secret trust, having for its object the conferring of freedom, or *quasi* freedom, upon John and Louisa, in this State, if such secret trust existed." The Court charged as requested, but added that, "the jury should require convincing and positive evidence of such secret trust."

"That Louisa's interest of \$2,000 was a contingent interest and not a vested interest, and could not, by the terms of the will, vest until she should, in 1875, make her election to go to a free State." The Court charged as requested, but added: "I give you this in charge unless you find that the time was shortened by the decree of 1855."

"That as the contingency upon which she was to get the \$2,000 never happened by reason of her death, there can now be no recovery of the same by John, the remainderman." The Court charged as requested, but added: "I give you this in charge, unless you find that the time was shortened by the decree of 1855."

8th. Because the Court erred in the following charges to the jury:

"The defendant is personally responsible for all debts lost by the estate and which he did not secure.

"The complainant claims the legacy given to himself in the sixth item of the will as well as that given in the seventh item, and if the jury find from the evidence that it was the intention of the testator that John should receive these legacies, it was, when the will was probated, and still remains the duty of the executor to pay said legacies.

"The trusts created in this will in favor of John and

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Louisa, his mother, were legal trusts, as they did not contravene the policy or violate any law of this State.

"If you find that there is a contest before you about two wills of Augustus H. Anderson, one a written will, duly executed and probated under one law, and contravening no public policy, nor violating any law of this State; the other an unwritten will, and having but one witness, and contravening by its terms both the policy and the law of the State, it will be for you to determine under the evidence which really indicated and faithfully represented the intention of the testator; that is to determine the question, and the law presumes in favor of a legal intention.

"If you find from the evidence that Green, as executor, either in person or through another, bought lands at his own sale, neither the legatees nor the testator's estate are estopped thereby, but may repudiate his purchase so far as their rights are to be effected thereby, and he holds said lands subject to their rightful claims.

"If you find from the evidence there has been no complete administration of the assets of the estate, then this plea of defendant fails, and your verdict may also be against the assets in his hands to be administered, or in default of such assets against his personal goods. You are at liberty under the Code to so mould your verdict as to effectually give the relief for which complainant prays.

"An executor had no right during the war to invest in Confederate bonds without first getting an order for that purpose from the Superior Court, nor had he the right to let out moneys of the estate without good security, and if a loss accrues from his neglect in these respects he is responsible for that loss.

9th. Because the Court erred in refusing to charge the following written request, to-wit:

"To establish such secret trust it is not necessary for the defendant to prove that the testator intended to free John and Louisa in this State absolutely. It is sufficient if they believe from the evidence that he attempted to change the

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condition in this State in any degree, from that of slavery, and if they believe from the testimony that the testator attempted to confer upon them any of the rights of freemen, such as to hold property or enjoy any of the benefits of freedom in this State, such attempt on the part of the testator vitiates the provisions of the will in favor of John and Louisa, and they are absolutely void, and the complainant cannot recover.

"If the defendant is barred by the statute of limitations and also is the complainant, and his demand as set forth in his bill is barred by the statute and cannot be enforced against the defendant."

"The complainant has waived the statute of limitations, and also the doctrine of estoppel, by filing a bill for discovery, and calling on the respondent to answer in regard to all the matters therein set forth, and he cannot urge them now against the defendant."

10th. Because said verdict is contrary to the following charge of the Court, to-wit:

"If you believe from the evidence that Green has fully administered the estate of Anderson, and that the schedule presented constitutes the assets of the estate, then, whatever recovery can be had (if any) must be against these assets and such as may hereafter come to his hands to be administered, subject to be first abated by the two debts set up in the defendant's answer, to-wit: The debt due to the wife of Augustus H. Anderson, Jr., and the debt due Green himself, the jury first being satisfied from the proof that said debts are proper charges against said estate, and provided there has been no mismanagement on the part of the executor."

11th. Because said verdict is contrary to the law and the evidence, for that the jury in returning said verdict failed to allow and make provision therein for the payment of the debt to Susan J. Anderson, and the claim or demand due to defendant under testator's will.

12th. Because the Court erred in dismissing the plea of

relief filed by defendant under the Act of the Legislature, approved October 13th, 1870.

13th. Because the name of William C. Palmer, one of the jurors who tried the cause, is not upon the jury list of the county, which fact was unknown to defendant until after trial.

14th. Because said verdict as rendered does not comprehend the issues submitted by the pleadings in the cause, several of the jury stating in their places while returning said verdict, and before it was entered on the minutes of the Court, that they desired thereby only to subject the assets admitted by the defendant in his answer to be in his hands unadministered, to the payment of the amount found by them for complainant, and that they did not intend by their verdict to make the executor personally liable.

15th. Because the Court erred in refusing to direct the jury, as requested by defendant's counsel, to retire and amend their verdict as to make it express their meaning with reference to the defendant's plea of *plene administravit propter*.

At the hearing of the above motion for a new trial, complainant moved the Court to reform and correct the decree rendered upon the verdict returned by the jury, and substitute in lieu thereof one which followed the verdict in terms of the law. The motion was overruled and complainant excepted.

A similar motion was made pending the motion for a new trial, which was overruled and the decision carried to the Supreme Court, where the writ of error was dismissed as having been prematurely brought.

The two last grounds of new trial are based upon the following facts, to-wit: When the verdict was returned by the jury, counsel for defendant asked them if they intended to find defendant individually liable for the amount of the verdict? One or two of the jurors responded that they did not. Considerable confusion ensued, during which others of the jury said that they were satisfied with the verdict. Upon the motion for a new trial the affidavits of some of the jurors

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ought to be used to show what they intended by their

motion was sustained and a new trial ordered.

of which rulings complainant excepted and assigns
as error.

LAWSON; HOOK & GARDNER, for plaintiff in error.

JONES; A. M. RODGERS, for defendant. 1st. The
of the will is void: Act of 1818; Cobb's Digest,
Ga. R., 253; 6 Ga. R., 539; 26 Ga. R., 225; 20
338. 2d. The expression of the Court of doubts as
w in his charge was error: 8 Ga. R., 258; 38 Ga. R.,
Ga. R., 36; 34 Ga. R., 458. 3d. "Positive and
ng evidence" was not necessary to establish secret
Green. on Ev., sec. 1; 7 Ga. R., 467; Code, sec.
9 Ga. R., 285. 4th. Estoppels are odious: 1 Serg.
, R., 442. Must be mutual: 23 Ga. R., 521. 5.
l existence of the 6th and 7th items of the will is in
i. A void judgment may be attacked anywhere, at
: Code, secs. 3536, 3776. Executor is not estopped
te of will from moving to set aside: 23 Ga. R., 521;
c. 3700. Liability of executor for loss of debts:
s. Ex., 1647; 37 Ga. R., 205; *Ibid.*, 230. 7. Dis-
f Superior Court not interfered with: 26 Ga. R.,
Ga. R., 557. 8. Motion to reform decree came too
Ga. R., 568.

GOMERY, Judge.

r the sake of convenience, I will consider the first
ty-first points decided by the Court, together. To
v party against whom a verdict is rendered, when it
mid unambiguous in its terms and legal effect, to ex-
s jury as to their meaning, is to give great advan-
s; litigant of influence and position in his county,
posed by one of little or no influence. The jury
the proper place for the jurors to give their views as

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to what the verdict should be, and having there come to a conclusion as to the rights of the parties, they have but one more duty to perform, and that is to return their finding into Court. To suffer the jurors to be interrogated as to what legal effect their verdict is to have, is closely allied to, if not identical with, calling a juror to impeach a verdict rendered by him. To justify such a course, the verdict must, at least, be so ambiguous as to convey no definite meaning upon one or more of the issues involved. An award and a verdict have been held by this Court as very analogous to each other. In *Goodin et al. vs. Mitchell et al.*, 3 *Moore*, 241, (4 E. O. L. R., 432,) the Court of Common Pleas held that, "if the terms of an award be clear upon the face of it, the Court will not admit an affidavit of one of the arbitrators to explain their intention." See *Settle vs. Allison*, 8 *Georgia*, 208, and quotation there found from *Spencer vs. Golter*, 1 *H. Bl.*, 79. In *Murphy vs. Griggs*, 41 *Georgia*, 464, this Court held it was no such error as entitled the party cast to a new trial, when the Court refused, on request of counsel, to ask the jury if they had agreed upon a verdict, unless counsel would state some legal reason for making the request. And the judgment of the Court below, granting a new trial on this ground, was reversed. The tendency of this case is to show that unnecessary questions should be asked the jury, even by the Court, much less should counsel bring the pressure of public opinion to bear upon the jury by demanding, in open Court from them, an explanation of the plain, unambiguous result of their deliberations in the jury room. Especially is this true in this case. The attempt of counsel was to show that the jury did not mean to hold the defendant personally liable. Their attention had been specifically called to this view of the case in the charge set forth in the tenth ground for new trial, and yet they had declined to find as therein instructed as they should have done if they entertained the view that counsel, by his examination, was seeking to commit them to. Upon the whole, we see no substantial difference between the course pursued in this case and the calling upon a jury

to impeach a verdict rendered by him. And this has been repeatedly held by this Court to be inadmissible.

2. The main issue involved in the case was made by the defense of *plene administravit præter*, set up by the executor in his answer. The attention of the jury was distinctly called to this defense by the Court in his charge, and instructions given them how to find if they should sustain it. From the verdict, and by that alone we are to be guided, it is very plain that they did not sustain this defense. There can be no dispute that they have found a verdict for \$5,000 and interest for complainant. Whenever an executor or administrator is sued and pleads *plene administravit præter*, and a verdict is had against him the judgment must necessarily be *de bonis testatoris et si non de bonis propriis*, or a judgment *quando* for the whole (if the assets admitted to be on hand and are worthless) or a part of the amount found due, (if the assets in hand are available to some extent) accordingly the verdict may be: Code 3515. Is it possible to enter a judgment *quando* on the verdict in this case? Every reasonable construction is to be adopted in favor of a verdict: 7 Ga., 361. Would it not require a very unreasonable construction of this verdict to found the judgment *quando* upon it? Is it not plainly a finding of the issue presented by his defense against the executor? It is trifling to say the verdict means that \$5,000 and interest are to be raised out of assets not worth five cents, with the exception of the Nesbit mortgage, which, if fully paid, will scarcely satisfy half the verdict, and the executor in his answer seems to rank this among his other insolvent assets. If the intention of the jury was to exonerate the defendant from personal liability, they should have found a verdict upon which a judgment *quando* could have been entered. The amount found is "to be raised out of the estate of A. H. Anderson, deceased, in the hands of M. P. Green, executor," that is, in his hands now, when the verdict is rendered. But the defense of the executor was that he had no such amount in his hands. This verdict says as plainly as language can say that he did have,

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or ought to have, and his own evidence shows that he did have. It will be remembered that the Court charged the jury, and charged them correctly, that "if you find from the evidence that Green, as executor, either in person or through another, bought lands at his own sale neither legates, or (nor) creditors of testator's estate are estopped thereby, but may repudiate his purchase, so far as their rights are to be affected thereby, and he holds said lands subject to their rightful claims." By defendant's own admission he "did purchase some of the property sold through another, and is now in possession of the same;" and it appears from his returns that said property consisted of three thousand six hundred and eighty-seven and four-tenths acres, which the executor, through another, bid off at \$19,358 85. This property was not included in the assets admitted by the executor to be still in his hands as belonging to the estate. Here was one item alone then, after making due allowance for the depreciation in the value of the land by the results of the war, which would probably pay the amount found by the jury, and which they were justified in treating as assets in his hands under the charge. If it be said that he testifies that he paid all of this \$19,358 to the debts of the estate, and is therefore equitably entitled to stand in the shoes of the creditors whom he paid, the reply is that by his own testimony the debts amounted only to some \$50,000; that under the decree of November, 1855, he sold property to the amount of \$100,000, part cash, the balance on one and two years credit; that "the cash received from the various sales was applied to the payments of debts, and there was not quite enough for the purpose." If the whole of his purchase is to be treated as cash received and included in the above statement, as it may be, as all the land was sold for cash, still he ultimately has in enough to pay all the debts and more, for he says in his testimony the schedule of assets now offered by him as all the assets remaining in his hands "represents the sale notes and funds as were received by witness in payment of the sale and afterwards loaned out," etc. Conceding for the pur-

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the argument, that he might claim to stand in the shoes of the creditors whom he had thus paid with his private funds, yet he knew, or should have known, that the sale to himself was voidable, and the legatees could require of him to turn the land to the estate and look to the cash assets for reimbursement for whatever amount he may have used of his private funds to pay the debts. He chose to take the risk, and must abide by it. It is true he does not state how much of these sale notes were paid, and so loaned out by him, but it appears from his own return of sales made by him on May 5th, 1857; that on the 12th, 13th and 14th of February, 1856, he sold \$68,136 85 worth of land and negroes. All that he did not get in cash he took notes for, according to his own testimony. In the schedule of assets which he now presents as the entire assets remaining in his hands, there are but five notes bearing date so early as February 12th, 13th and 14th, 1856, to-wit: M. A. Thompson's, two notes for \$268 each, dated February 12th, 1856; T. A. Parsons, one for \$144 40, same date; I. B. Jones' note, of same date, for \$43 60, and Ramsom Lewis' note, dated February 1st, 1856, for \$698 34.

All the notes, then, which were given on the days of sale by the purchasers, were either paid or renewed, with the above significant exception. In addition to the land and negroes, he sold, at the same time, personalty to the amount of 10,255 66, no one item of which sold for as much as \$300; the land sold for cash, it is presumed these small items were also sold in the same way, though that does not affirmatively appear. In comparing the list of purchasers of the land and negroes with the list of makers of notes in the schedule of assets now set forth, very few of the purchasers' names appear in the present schedule, and those that do so appear, owe small amounts. It would seem to follow that most of the original purchase notes have been paid by the makers, and not renewed, and that most of the notes now set forth in his schedule represent "such funds as were received in witness in payment of the sale notes, and afterwards

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loaned out." Without pausing to make the exact calculation, it abundantly appears in this way that he must have received in payment of the sale notes far more than he gave for the land purchased by him, and the money so received, as he testifies, he afterwards loaned out. How, then, does his equitable claim, to be considered as subrogated to the rights of those creditors whom he paid with the money bid for the land, stand? He made a voidable purchase at his own sale; he paid creditors with the money he bid. Afterwards, he received, in cash, far more than enough to reimburse himself. Instead of doing so, he loaned the money out and the borrowers became insolvent. Who should lose, himself or the legatees? Here, then, are assets, not admitted in his answer, which his own evidence shows to be still in his hands.

It also appears from the credits upon A. H. Anderson's note alone—such credits amounting to more than \$16,000—that the only debt now set up as existing against the estate could have been canceled, or very nearly so, by the trustee creditor as a debtor to the estate in his individual character. Instead of thus paying this debt, which is of the highest dignity, this money seems also to have been loaned out and thus lost. Who should suffer, the executor or the legatees? The award of Charles J. Jenkins and Thomas M. Berrien, made November 1853, makes the principal of this debt \$8,120 83. A. H. Anderson's note is dated June 13th, 1857. The first credit on it is \$9,405, without date. Two other credits, one for \$2,550, the other for \$4,310 66, are also without date, but by Anderson's receipts, dated in March and October, 1862, we learn that the two last credits were appropriated to the payment in full of all interest due upon the trust debt. Why was not the other credit of \$9,405, also paid to the trust debt? Had it been, the debt would have been extinguished, or nearly so, after making allowance for a payment presently to be noted.

If the excuse be that he paid it once to other creditors, the reply still is, that he must have collected more than enough from the sale notes given for the negroes sold in February,

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alone (not to notice later sales,) to pay all the debts left appropriating the cash sales to that purpose, which cashifies was not quite enough to pay off all the debts. then, seems to be a *devastavit* to the extent of the pay-by Anderson. If he loaned it out, he did it at his own

If the payment to W. J. Rhodes, trustee of Mrs. S. Anderson, charged against the estate in the return for 1858, amounting to \$2,392 63, is to be taken as a part of this somewhat over \$7,000 is still not appropriated, as it d have been. It may or it may not have been a part of fund; neither the date of the credit, nor of Rhode's er, is shown by the record. If the voucher antedates edit, the payment to Rhodes is not a part of the latter. claim of the executor to be a creditor, on the score of rrender of the *usufruct* of the realty bequeathed to him, not deserve serious consideration. If one legatee can so orm himself into a creditor, to the disadvantage of the s, and without their consent, it would be very easy for a e of an estate, unable to pay all the legacies, to get lvantage of the others, especially if he were executor. s, whether we consider the executor bound by the decree 55, or by the will, each equally enjoin upon him to pay mplainant's expenses to a free State, and to educate and ain him until he arrived at age, which occurred in 1862, ich time he was to invest \$3,000 for him. This trust used to execute, and he cannot now set up the loss of nds to exonerate himself, which occurred subsequent to me during which the boy was to be educated and then ed for. The executor neglected his duty at his peril. also, is a *devastavit* to the extent of the cost of main- and education, and \$3,000, directed to be invested. s, the defendant says, in one of the amendments to his s, that he received, on the sale notes given for negroes ther property, the sum of \$23,975, in Confederate treas- ure. He does not say when he received them. It is s, that he did not do so after prudent men had de-

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clined them in payment of debts due themselves. * He sold, on credit—

In January, 1859, perishable property to the amount of.....	\$ 651 93
In January, 1860, he sold land, on credit, to the amount of.....	8,500 00
In March, 1859, he sold negroes, on credit, to amount of about.....	8,500 00
In February, 1856, he sold negroes, on credit, to the amount of.....	39,759 00
Total	\$57,413 93
Deduct the amount received on these notes in Confederate money.....	23,975 00
Remainder.....	\$33,438 93

received by him in gold, on his credit sales, before the war. Here is a fund ample enough to have paid the trust debt and the complainant's legacy in gold, besides the small amount of debts left unpaid after the proceeds of the cash sales had been appropriated to the payment of the debts. If, instead of doing so, the executor loaned the money out, whose loss should it be if the borrowers became insolvent? As little as the unpaid legatee can ask is, that he take the \$23,975, received by him in Confederate money, in payment of the amount paid by him for the land purchased at his own sale, and which, he says, was used in payment of debts due by the estate. If the estate owed money, and the creditors refused to receive Confederate money in payment, he should have refused to receive it in payment of the sale notes. And he, at best, can only stand in the shoes of a creditor to the extent of his private funds used to pay the debts, and if willing to receive Confederate money for debts due the estate, should have been equally willing to receive the same currency in payment of the debt of the estate to him, created by his violation of duty in purchasing at his own sale. The verdict, then, viewed alone, being unambiguous in its terms, and, when understood it, binding the executor personally to the estate.

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devastavit shown, and, when examined in the light of evidence, being just such a verdict as should have been rendered, (upon the hypothesis that it is a finding against the plaintiff's defense of *plene administravit præter*,) we are of opinion that the complainant is entitled to a judgment thereon *ius testatoris et si non de bonis propriis*.

Such being the view we take of the verdict, it follows the decree rendered thereon is erroneous and should be amended so as to be made to correspond with the verdict: 3504, 4153; Rawlins vs. Shropshire, decided March 1872. Neither do we think that under the facts of this case the plaintiff in error is estopped from moving to reform the decree, nor from alleging error upon the refusal of the clerk to do so.

In one view of this case, the verdict is not for too much, conceding that the complainant is not entitled to recover \$2,000 left to his mother for life, with remainder to him. He was entitled to his freedom and eight years of schooling. He got the former by emancipation in 1865. After he has never received. We do not think \$5,000 interest thereon from November, 1854, an unreasonable price for twelve years of slavery, a deprivation of education and three thousand dollars in cash, and the interest on the mentioned sum from February, 1862, from which the complainant was entitled to the interest, as he then died at age. Nor are we prepared to say that he was not entitled to the \$2,000 left to his mother for life, more especially after 1875, the time at which she was to make her election had she lived and emancipation had not in the mean time been brought about), as to whether she would go to a wife or not. If he had a vested remainder in it, then, in his life, it was surely worth something at the time of the death. Upon the whole, we are satisfied the verdict is not erroneous, than, under the evidence, the complainant is entitled to it.

The fifth, sixth and seventh points decided by the Court, need be added.

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8th and 9th. Defendant complains of the ruling of the Court, that that part of his answer setting up a secret trust is not responsive to the bill. While we do not think it is responsive, there is yet another reason for excluding it. The defendant is estopped from setting it up. It is said that estoppels must be mutual. Granted. The sufficient reply here is—this estoppel is mutual. The complainant is as much bound by the judgment of the Court of Ordinary, declaring this paper writing to be the will of Augustus H. Anderson, as is the defendant. The judgment of the Ordinary, probating a will, is a judgment *in rem*, and binds all the world, immediately, if in solemn form. After seven years (minor heirs at law specially excepted by statute), if only in common form, even minor legatees (as such) are bound by the lapse of seven years, unless they be held to fall within the equity of section 2390, of the Code.

But supposing the executor could yet attack this will. Can he do so collaterally in the present forum? Must he not go into the Court of Ordinary for that purpose. I think so: *Tarver vs Tarver*, 9 Peters, 174; *Cowen & Hill's Notes to Phil. Ev.*, part 2, n. 42; Code, 3700.

10. Nothing need be added to the tenth point decided by the Court. Sections 2871 and 2875 of the Code are conclusive.

11. Very little need be said in support of the decision on the eleventh point. If a legatee by filing a bill calling on an executor for a discovery, opened the door for the executor to attack the will, then all an executor, who had proved a will in solemn form, would have to do, in case he desired for any reason to reopen the judgment of probate, would be to refuse to execute the will, and force parties interested to file a bill against him, which must, in the nature of things, be a bill for discovery nine times out of ten.

12. Believing as we do the verdict to be for no more than the complainant was entitled to recover, the charge of the Court as to complainant's right, under the decree of 1866

ver the \$2,000 legacy left to his mother, conceding it to error, is an immaterial one.

3. Had the executor performed his duty, and faithfully charged the trusts of the will at the proper time, he would have had abundant assets for the purpose of giving constant his maintenance, education and \$3,000. The estate, when it passed into his hands, was worth more than \$200,000, perfectly solvent. He continuously refused to execute the trust from 1853 until the present time. The estate remained entirely solvent until the war closed. He cannot shelter himself from personal liability, by the subsequent insolvency of the estate occurring long after he should have performed his trust.

4. In support of the 14th point decided, it is only necessary to refer to the decision made in this case, when once brought to this Court, in 38 *Georgia*, 655.

5. The presumption of the law is in favor of the legality of the testator's intention in making the will, and the will is valid on its face. The time has passed within which the executor could have attacked it as void, for the reasons set forth in his answer, even if he could do so at all collaterally.

6. It has been too repeatedly held, that a purchase by an executor at his own sale is voidable, at the election of a beneficiary, to require more than a statement of the proposition.

7. The defense of *plene administravit* having been relied upon by the defendant, the charge quoted on this point was perfectly and correct.

8. The charge of the Court that the defendant had no authority to invest the funds of the estate represented by him in Confederate securities without an order of Court, was made by the Court in an oversight on the part of Court and counsel in failing to note the Act of March, 1864, allowing such investments of Confederate money on hand, prior to April 1st, 1864, without such an order. But this Act was passed near the close of the war, and long after the defendant, by his failure to execute the trust, had rendered himself personally liable. The charge, therefore, was immaterial.

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19. The Relief Act of 1870 expressly exempts from its benefits executors, and other trustees who have unfaithfully, or negligently mismanaged the property in their charge.

20. The thirty-fifth ground for new trial is as follows: "Because the name of William C. Palmer, one of the jurors who tried the case, is not upon the jury list of the county, as made up in conformity to the Act of the General Assembly, approved February 15th, 1865; which fact was unknown to the defendant or his counsel until after the trial and the verdict." Precisely this objection is made in *Gormley vs. Laramore*, 40 *Georgia*, 253; and the disqualification held to be one *propter defectum*, which must be taken advantage of "before the county has put itself to the trouble to try the case. The fact that the party objecting was not informed of the want of qualification of the jurymen does not help the case. With proper diligence he could have been informed. The list is on file, subject to the inspection of all, and it is his own want of diligence that kept him in the dark."

Let the judgment of the Court below be reversed.

SAMUEL HEYS, plaintiff in error, *vs.* R. T. WALTERS, defendant in error.

An appointment by the Judge of the Superior Court, of one to perform the duties of sheriff, under section 251, of the Revised Code, held until there is an election of some one to fill the vacancy, as provided by law, and no longer.

Vacancy. Sheriff. Revocation of appointment. Before Judge CLARK. Sumter Superior Court. April Adjourned Term, 1872.

On April 8th, the first day of the regular April Term, 1872, of Sumter Superior Court, the following order was passed:

"The office of sheriff being vacant, and the coroner of the county declining to act as sheriff during the term of

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Court, ordered by the Court that Samuel Heys be and he is hereby appointed sheriff, and W. W. Guerrey, deputy sheriff, during the said term."

The April Term was adjourned to the Monday in May, 1872. On the 6th day of May, 1872, the Court passed the following order:

It appearing to the Court that Samuel Heys was appointed the Court sheriff on the day of April last, there being a vacancy in the office, and it further appearing that R. T. Walters has presented a commission from his Excellency Governor, for said office of sheriff of Sumter county, ordered by the Court that the order appointing Samuel Heys, sheriff, be and the same is hereby set aside, and that Samuel Heys will immediately turn over the books, papers, etc., belonging to said office to said R. T. Walters."

The last order was granted without first obtaining a rule calling upon said Samuel Heys to show why said first order should not be set aside, and why he, the said Heys, would not turn over said books and papers to said R. T. Walters, and without any written notice to said Heys.

As to the granting of the second order, plaintiff in error excepted, and says that the Court erred upon the following grounds, to wit:

1st. The said Samuel Heys could not be called upon without a rule *nisi*, or some written notice to turn over the books and papers pertaining to said office of sheriff.

2d. The said Samuel Heys had, under his appointment as sheriff, under the first order, the right to hold said office for ten days after the adjournment of the Court for which he was appointed.

A. SMITH, for plaintiff in error.

W. W. GUERREY & HOLLIS; J. A. ANSLEY, for defendant.

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McCAY, Judge.

Taking section 251 of the Code literally, its words, "who holds his office during the term and ten days thereafter," seem to justify the claim of Mr. Heys to hold this office until ten days after the final adjournment of the Court.

But the section is to be construed in view of its object, to-wit: to supply the immediate necessity for a clerk or sheriff at the time of the meeting of the Superior Court. The Constitution and laws generally contemplate that these officers shall be elected by the people, and this temporary selection of such an officer by the Judge for the nonce, to-wit: at the time of holding the Court, is to be very strictly construed and not carried beyond the *actual necessity*.

In this case, the ordinary term was over, even the ten days thereafter had expired. But there was an adjourned term to be held, and it is contended that this carries over the term of the appointee until ten days after the final adjournment.

We do not agree with this construction. The great object of the provision is to meet the emergency. We are not prepared even to say that if a regular clerk were elected during the regular term, and were to demand his place, the appointment would not fall, since the emergency had ceased. But after the Court has adjourned to a different day the terms of the act are complied with, its reason is satisfied.

By the next section it is clear that it was contemplated that the appointment should cease when the regular clerk was elected.

Taking both sections together, and especially considering that the object of both is simply to meet a special emergency to-wit: To secure officers at actual sessions of the Court—power of the appointee to hold over is rather permissive than mandatory, and we conclude that there was no intent to extend the term beyond ten days after the actual session of the Court.

As we have said, we are not prepared to say that the appointee would not yield to the regular officer, whenever

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is elected and qualified, but we feel that it was clearly not intent to carry the appointment over, simply because the dge has appointed an adjourned term.
Judgment affirmed.

JAMES D. CARHART *et al.*, plaintiffs in error, *vs.* MARY VANN, defendant in error.

here land is "regularly advertised and sold at administrator's sale," (and the record states no more) and is afterwards levied on under judgment obtained against the intestate in his life time, and the Court decides that the administrator's sale divests the judgment lien—to which judgment exception is taken—the plaintiff in error must show affirmatively that the estate was solvent, and the order of sale was not granted for the payment of debts, but for distribution only, in order to entitle him to a reversal of the judgment, even if this would do so. And as to this, we reserve our opinion.

Administrator's sale. Title. Judgment lien. Before Judge
KRELL. Miller Superior Court. April Term, 1872.

James D. Carhart and William B. Carhart brought three
ons of complaint for different tracts of land situated in
county of Miller, two against Mary Vann and the third
tust Mary Vann and Crawford Long. The cases were
mitted to the Court upon the following agreed facts:

That the property in controversy was the property of
as S. Vann; that Vann died some time in 1866; that
this was regularly administered upon, and the land in
erary regularly advertised and sold at administrator's
that the parties defendant hold under title acquired at
administrator's sale; that subsequent to said administra-
a *fiери facias*, issuing from the fifth Circuit Court
United States for the Southern District of Georgia *vs.*
Vann, was levied upon the same land; that the said
e was sued out before the death of Joshua Vann,
ed as stated above upon the land in controversy after

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its regular sale at administrator's sale; that plaintiffs claim title under this last sale.

The Court held that plaintiffs acquired no title under the sale by virtue of the levy under the aforesaid execution. To which decision plaintiffs excepted and now assign said ruling as error.

FLEMING & RUTHERFORD; G. J. WRIGHT, for plaintiffs in error.

R. SIMS; J. A. & ISAAC BUSH, for defendants.

MONTGOMERY, Judge.

At common law, or rather by the operation of the statute of Westminster, 2, 13 Ed., 1, judgment liens existed against the lands of the debtor from the first day of the term at which the judgment was obtained. The statute of frauds, sections 13, 14 and 15, altered the rule so far as purchases were concerned, and enacted that the judgment as to the land should date from the time at which it was actually obtained. If, after judgment against the debtor, he died, his land passed to his heir, cumbrued with the judgment lien, the creditor being obliged, of course, to look first to the personal assets in the hands of the executor or administrator for the payment. By the 16th section of the statute of frauds, these were bound by the judgment only from the time the execution was delivered to the sheriff; and the section required the sheriff to indorse on the execution the date of the delivery to him, "for the better manifestation of the said time." The judgment lien so fixed upon the personal assets did not prevent the executor or administrator from disposing of the same, the rule being "that an executor or administrator has an absolute power of disposal over the whole personal effects of his testator or intestate; and that they cannot be followed by creditors, much less by legatees, general or specific, in the hands of the alienee. The principle is that the executor or administrator in many instances *must* sell in order to

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is duty in paying debts, etc.; and no one would an executor or administrator if liable afterwards to to account:" 2 Williams' Executors, 670, (2d Edition, from 2 London;) Toller's Executors, book, sec. III.

hurlow, in Scott vs. Tyler, 2 Dick., 725, (quoted in 'rs, 671) says, "It is of great consequence that no d be laid down here which may impede executors lministration, or render their disposition of the tes- acts unsafe or uncertain to a purchaser. His title is by sale and delivery. What becomes of the price oncern to him." Again in Farr *et al.* vs. Newman, 130, Grose, J., says, "The power of selling or dis- the goods of the testator the executor must have; sarily incident to his office; without that power his ot be executed, nor can the purposes for which it is answered. Therefore, when he sells, the law in- t he sells the goods of the testator to answer the for which the power of selling was given; and in he does that which is necessary to his authority, and lawful, just and right." See also Buller, Judge's *Ibid.*, 641, and Ashhurst's, page 644; see 1 Kelly, ohns. Ch., 150. The judgment creditor whose lien o the personalty, living the debtor, and within a re his death, may levy upon such personalty, *when the hands of the executor or administrator*: 2 Wms' 22. I will add that a judgment is only a general ot a specific lien upon the property of the debtor: Prac., 936. Under the authorities quoted, the ex- administrator may, at common law, divest the ion of a judgment which has attached upon the the testator or intestate by placing the execution in of the sheriff before the death of the debtor. they can sell the property of the testator so as to nffe liens as a mortgage, for instance, it is not nec- sider.

law, all the property of a debtor is bound by a

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judgment against him from the time of its rendition. as personalty, then, is concerned, if the debtor die after death, no distinction is perceived between the power of the executor or administrator to dispose of it and the power of judgment lien under our statute, and the power under the statute of frauds where the execution was placed in the sheriff's hands before the death of the debtor. But the power of the representative to dispose of the real estate of the decedent is more limited. He can only sell that when necessary to pay debts, or for purposes of distribution: Code § 3442.

We are very clear that a sale of land to pay debts divests a judgment lien. The reasons given for the rule that judgment liens on personalty apply with full force. When a sale for purposes of distribution alone would do so, we are not now prepared to say. Where the record fails to show the purpose of the sale and the condition of the land, but does disclose an outstanding judgment against the decedent, we will not presume that the sale was for distribution. Indeed, the more natural presumption would be that it was for the payment of debts, and that the money is to go into the hands of the administrators for that purpose, or has been paid in satisfaction of debts of higher dignity than the judgment creditor. For it is to be observed that although a judgment debt may be the highest in dignity during the life of the debtor, on his death it at once takes rank with four other classes: 1st. Funeral expenses. 2d. Expenses of administration, including a provision for the support of the family of the deceased debtor. 3d. Taxes and other debts due the State, or United States. 4th. Debts due by the decedent as trustee for any appropriation of trust funds for his own use. To these may be added the widow's claim for dower. See *Simmons vs. Latimer*, 37 Georgia, 495; 2494. This enumeration shows the necessity of allowing the administrator or executor to divest judgment liens by selling the decedent's property to pay the debts of the estate. Otherwise, the practical effect would be to give the judgment creditor priority over the four classes hereinbefore named, and

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would bring little or nothing at administrator's sale, if to be afterwards levied on, and sold under judgments rendered against the intestate.

The conclusion then is, that a sale of land by an administrator, legally made for the payment of debts of the intestate, divests judgment liens, and where the record fails to express terms that the estate is solvent, and that the property was sold for distribution alone, but does show an existing unsatisfied judgment against the estate which has been levied on the land sold by the administrator, the natural presumption is, that the sale by the administrator was for the purpose of paying the debts of the estate, that being so, the lien of judgments obtained in the name of the intestate is divested by the sale. Judgment affirmed.

THOMAS R. LUMSDEN, plaintiff in error, vs. ELLIS MANES, defendant in error.

A defendant is sued upon a note given in the year 1863, in part payment for property, of which he was in possession of an undivided part at the time of the trial, he is entitled to the benefit of the provisions of the Ordinance of 1865, notwithstanding his refusal to deliver the property for the note. (R.)

Appeal from the Ordinance of 1865. Before Judge JOHNSON. At the Superior Court. March Term, 1872.

For the facts of this case, see the decision.

HILL; M. BETHUNE; E. H. WORRILL, for plaintiff.

W. A. LITTLE, for defendant.

JOHNSON, Chief Justice.

This was an action brought by the plaintiff against the defendant on a promissory note for the sum of \$1,500, dated

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10th of October, 1863, and due 1st of January, 1865. The note was given in part payment of a mill. The mill was sold for \$6,000 in Confederate money, was worth at the time of the purchase \$2,000 in the present currency. Defendant had sold one half of the mill for Confederate money, and at the time of the trial was in the possession of the undivided half of the land and mill as *trustee for his wife*. The Court asked the defendant if he would give up the property to the plaintiff, he being willing to accept the same and surrender up to defendant his note. The defendant declined to give up the property to the plaintiff. The Court then charged the jury, "that the defendant was not entitled, under the state of facts, to any relief by way of reducing the note sued on, that the only relief for him was to surrender the land; that he must either give up the land and mill, or pay the note." The jury found for the plaintiff \$1,500, with interest and costs of suit. The defendant excepted to the charge of the Court. This was a Confederate contract, and the equities of the parties were to be adjusted under the provisions of the Ordinance of 1865, which the defendant relied on in his plea to the plaintiff's action. In our judgment, the charge of the Court to the jury was error, the more especially as the defendant was in the possession of the property in *right of his wife*, and not in his own right.

Let the judgment of the Court below be reversed.

H. A. SCOTT, trustee, plaintiff in error, vs. THOMAS BERRY, defendant in error.

1. The holder of a rent note, who is not the landlord, cannot sue on a distress warrant for rent not due. But when, in such a case, the affidavit made for the distress warrant, describes the sum sued for as rent for a plantation owned by a third person, and the rent note is payable to such third person or bearer, it does not necessarily follow that the affiant is not the landlord. If such was the fact, it should be shown upon an issue raised by counter-affidavit before the jury. The Court asked to charge the law applicable to the case.

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Distress warrant. Landlord and tenant. Before Judge HARRELL. Clay Superior Court. March Term, 1872.

Thomas Berry made affidavit for a distress warrant as follows: "That H. A. Scott, trustee for his wife and children, of said county, is justly indebted to him, deponent, in the sum of \$1,500 for the rent of the plantation of J. F. Trentlen, for the year 1871, and which sum is to mature and become due on December 1st, next, and that the said H. A. Scott, trustee for his wife and children, is seeking to remove his crop from the premises."

This affidavit was based upon a note dated November 29th, 1870, due December 1st, 1871, for \$1,500, payable to J. F. Trentlen or bearer, for rent of plantation for the year 1871, of which Berry was the holder. Scott made the usual counter-affidavit, and upon the trial, moved to dismiss the distress warrant upon the ground that plaintiff, as appeared of record, was not the landlord of defendant, but was the holder of the note given to the landlord, and was, therefore, not entitled to the process of distress warrant.

The motion was overruled and plaintiff in error excepted.

B. EKEMAN; H. FIELDER, for plaintiff in error.

JOHN C. WELLS; JOHN T. CLARK, for defendant.

MONTGOMERY, Judge.

It is true that no one but a landlord may distrain for rent: Blackstone's Commentaries, 6, n.; therefore, the holder, as such, of a rent note cannot; but it is not true that only the owner of the fee can be a landlord. A lease is an estate and may be assigned: *Garner vs. Byard*, 23 *Georgia Reports*, 291. Hence, a tenant may sub-let; and, as to the sub-tenant, he is the landlord—that he takes a rent note, payable to the owner of the fee or bearer, is not inconsistent with the idea of a sub-lease. For aught that appears by this record, Berry was the original lessee of the Trentlen plantation, and he in

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turn sub-let to Scott. If such were not the fact, the issue should have been raised by the counter-affidavit and the proof submitted to a jury, or perhaps the proof might have been made upon the usual counter-affidavit. The motion to dismiss assumes that it appears by the record that Berry is not Scott's landlord. It only appears that he is not owner of the land rented.

Judgment affirmed.

B. J. HART, Receiver, plaintiff in error, vs. MORRIS LAZARON, defendant in error.

An injunction will not be granted to restrain the enforcement of a judgment when it appears by the bill that the Court in which the judgment was obtained had no jurisdiction. The remedy at law is complete either by affidavit of illegality, or by action of trespass.

Jurisdiction. Remedy at law. Injunction. Before Judge CLARK. Sumter Superior Court. April Term, 1872.

Morris Lazon filed his bill against B. J. Hart, Receiver of Harrison Haber & Company, containing, substantially, the following allegations: That on the day of 18..., complainant filed his petition in bankruptcy; that pending said proceedings in bankruptcy, defendant, a creditor of complainant, instituted suit in the Superior Court of Sumter county on a claim made before June 1st, 1865, attaching no tax affidavit, as required by law; that the claim sued on was provable in bankruptcy; that the defendant was duly notified of the proceedings in bankruptcy; that complainant was never served with a copy of the declaration in said suit; that defendant obtained judgment against complainant at the October Adjourned Term, 1871, of said Court, for \$400 principal, \$312 94, interest and costs of suit; that said Court, by reason of the proceedings in bankruptcy, had no jurisdiction of said action; that defendant is about to have the ex-

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ion, based upon said judgment, levied upon certain property imed by him to belong to complainant. Prayer: that defendant be enjoined from further proceeding to enforce said judgment; that the writ of subpoena issue.

Defendant demurred to complainant's bill. The demurrer is overruled and plaintiff in error excepted, and assigns said ruling as error.

HAWKINS & GUERRY, represented by CLARK & GOSS ;
. A. HAWKINS, for plaintiff in error.

C. T. GOODE, for defendant.

McCAY, Judge.

We see no reason for equitable interference, according to statements of the bill. The jurisdiction of a Court over subject matter or the person may always be attacked, unless the defendant has *appeared* and, by pleading to the writs, waived it. If the defendant was not served and did not appear, he may take advantage of it by illegality, according to the very terms of the Code: Section 3621. And, generally, any Court, where there has been no waiver by a party to the merits, will set aside a judgment which it had no jurisdiction to grant. (See Code, section 3537.) Our affidavit of illegality, in terms, except in the case provided for in section 3621, only applies to cases where the illegality is in the judgment. But long before this exception, provided for in section 3621, this Court had decided that an affidavit of illegality would lie if there was no service, upon the ground that the judgment was a nullity. And Judge Lumpkin, in *Parker vs. Jennings*, 26 Georgia, 141, says: "This Court has repeatedly held that an affidavit of illegality does not allow you to go behind the judgment, and that the validity of the judgment cannot be attacked by such a proceeding. It will be found, upon examination of the cases, that the judgment was voidable only, and not absolutely void. Of course, the judgment being good until set

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aside, when it is erroneous only, it supports the execution." The effect of this is to say that, if the judgment be void, illegality will lie. In this case, if what the complainant says be true, the Court giving this judgment had no jurisdiction, for want of service, and because the whole matter was in bankruptcy. Though of this latter we are not sure, unless the plaintiff knew, or was notified of the fact; still, if the Court had no jurisdiction, the judgment is void at law, and equity has no jurisdiction, because there is a good remedy at law.

Judgment reversed.

SARAH ERAMBERT, plaintiff in error, vs. JAMES J. SCARBOROUGH, defendant in error.

A judgment rendered by the Judge of the Superior Court, without the verdict of a jury, in a civil case founded on contract, when an issuable defense is filed on oath, should be set aside.

Pleading. Practice. Judgment by Court. Before Judge CLARK. Sumter Superior Court. April Term, 1871.

James J. Scarborough brought complaint against Sarah Erambert. The case being called and no response made by the defendant or her counsel, judgment was rendered by the Court for \$150, with interest and costs. Subsequently a motion was made to vacate said judgment upon the ground that an issuable defense had been filed on oath to said suit, and that the judgment of the Court without a verdict of a jury was void. The motion was overruled and plaintiff in error excepted.

JOHN R. WORRILL, for plaintiff in error.

N. A. SMITH; A. R. BROWN, represented by B. P. HOLLIS, for defendant.

MONTGOMERY, Judge.

Article V. section 3 and paragraph 3 of the Constitution gives the Court authority to render judgment, without the verdict of a jury in all civil cases founded on contract, where an issuable defense is not filed on oath. Section 13 of the same article provides that the right of trial by jury, except where it is otherwise provided in this Constitution, shall remain inviolate. Before the Constitution, cases like the present in the Superior Court were tried by jury. That mode of trial must "remain inviolate," except where "an issuable defense is not filed on oath."

Judgment reversed.

PERRY BENNETT *et al.*, plaintiffs in error, vs. ADONIRAM J. WILLIAMS, administrator, defendant in error.

1. Where a will, executed in July, 1850, the testator dying in 1859, conveys property in trust, the proceeds to be applied to the benefit of certain slaves, and provides that the survivor shall receive the whole benefit, the clause is inconsistent with the provisions of the fourth section of the Act of 1818, against manumission, and therefore void. (R.)
2. The will must be construed under the law as it existed at the time of the death of the testator. (R.)

Demurrer. Bequest to slave. Before Judge GREENE. Monroe county. At Chambers. October 3d, 1872.

For the facts of this case, see the decision.

WHITTLE & GUSTIN, for plaintiffs in error. 1st. The probate of the will concludes all parties in interest, as does also their acquiescence: 4 Ga. R., 445; Code sec. 3519. 2d. The third clause of Mr. Cotton's will is not contrary to Acts of 1801, 1818: Prince, 787, 794. 3d. Those Acts were only to abilit four things: 4 Ga. R., 91. 4th. The rule of *stare decisis* cannot be invoked: 4 Ga. R., 76; 18 Ga. R., 563; 6

 Bennett *et al.* vs. Williams.

Ga. R., 539; 42 Ga. R., 175; 15 Ga. R., 496; 38 655; 43 Ga. R., 142. 5th. If the intention of M ton cannot be literally carried out, the doctrine of "C should be invoked: Adam's Eq., 68; Code, secs. 309; 6th. Gifts to slaves favored: Cobb on Slavery, sec. 2

HAMMOND & STONE, for defendant.

WARNER, Chief Justice.

This was a bill filed by the complainants, praying injunction to restrain the defendant as administrator *non, cum testamento annexo* of John Cotton from selling land of the testator until a provision should be made from in favor of the complainants, under the third of the testator's will, which is in the following words: and bequeath to Peter Jones at the death of my wife, lots of my lands that he may select, on the trust for to-wit: the net proceeds and profits to be applied for the benefit of my three negroes, old Perry, his wife Sil and their grand-daughter, Elizabeth, a mulatto girl, he to divide and apply this property to their use, and at the death of either, the last survivor, or survivors, to receive the benefit." The will bears date 2d of July, 1850, and the testator died in July, 1859. The defendant demurred to the bill, on the ground that this clause of the testator's will was void under the laws of this State, at the time of making the will and at the time of the death of the testator. The Court sustained the demurrer, and refused to grant the injunction whereupon, the complainants excepted. The fourth section of the Act of 1818 declares that "all and every will, testament, deed, whether by way of trust or otherwise, contract, agreement, or stipulation, or other instrument in writing by parol, made and executed for the purpose of effecting or endeavoring to effect the manumission of any slave or either directly, by conferring or attempting to confer property on such slave or slaves, indirectly or virtually, by gift and securing, or attempting to allow and secure to any

or slaves the right or privilege of working for his, her, or themselves free from the control of the master or owner of such slave or slaves, or of enjoying the profits of his, her, or their labor or skill, shall be and the same are hereby declared to be utterly null and void." The complainants who were slaves at the time of the death of the testator, are now seeking to enforce that clause of the testator's will which conveyed the two lots of land to Jones in trust for their use and benefit. This clause of the testator's will must be construed under the law as it existed at the time of his death.

Whilst we have labored to carry out the intention of the testator, and to secure the property for the benefit of the complainants, if it could be done consistently with the law, still, we are forced to come to the conclusion that the mandatory requirements of the statutes of this State, which must control the question, leaves us no discretion but to declare a third clause of the testator's will null and void. The enjoyment and control of the profits of the two lots of land by the complainants as slaves, and the application of the property to their use and benefit would have been entirely consistent with their condition as such slaves, and in the very teeth of the provisions of the Act of 1818, which was the law of the State when the will took effect at the death of the testator, and must therefore control our judgment in this case.

Let the judgment of the Court below be affirmed.

WILLIAM O. CHENEY *et al.*, plaintiffs in error, vs. ELIZABETH A. DALTON, administratrix, for use, etc., defendant in error.

In the proceedings to establish a lost note, and suit is allowed after the rule *nisi* has issued, as allowed by section 8910 of the Code, and, pending the cause, the original note is found, it is proper to allow plaintiff to amend his declaration, so as to sue upon the original note thus found, even though there may be some immate-

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rial discrepancies between the original note and the copy which it was sought to establish.

2. Title to personal property may pass by sale without present delivery; but a mere promise to deliver, for a consideration paid, after the owner shall have done something necessary to enable him to deliver, does not pass title. The intention of the parties will govern. Thus, where A buys land of B, for which he gives him the note of a third person, and they afterwards cancel their trade, but B, having lost the note, promises to have a copy established, and then to deliver it in lieu of the lost original, or to deliver the original if found, the title to the note passed to A or not, at the time of the cancellation of the land trade, according as the parties may have intended. The jury in this case having found that the parties did not intend to pass the title to the note until it was safely delivered to A, which finding is supported by evidence, the verdict will not be disturbed.

Lost note. Personalty. Delivery. Rescission. Before Judge ANDREWS. Oglethorpe Superior Court. October Adjourned Term, 1871.

Jesse Dalton, for the use of James P. Dorough, brought complaint against William O. Cheney, Enoch Cheney and Andrew J. Watson on a note alleged to be lost, proceedings for the establishment of which were then pending. The copy attached to the declaration was as follows :

"\$500 00.—One day after date we, or either of us, promise to pay James P. Dorough, or bearer, the sum of five hundred dollars, for value received. 4th January, 1860.

[Signed]

"WILLIAM O. CHENEY,

"ENOCH CHENEY,

"ANDREW J. WATSON."

"Received, 4th January, 1861, the interest due on the note."

"Received, 4th January, 1862, the interest due on the note."

"Received, 4th January, 1863, the interest due on the note."

Plaintiff having died pending suit, Elizabeth A. Dalton, his administratrix, was made a party.

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The lost note having been found, plaintiff moved to amend the declaration as follows :

"Plaintiff says that since proceedings to establish the note, which is the foundation of this action, were begun, the original note has been found; and plaintiff further amends by declaring, upon said original note, of which the following is a copy :

"One day after date, I promise to pay James P. Dorough, or bearer, five hundred dollars, for value received of him. January 4th, 1860.

[Signed]

'WILLIAM O. CHENEY,
'ENOCH R. CHENEY, Security,
'A. J. WATSON, Security.'

'Received on the within note thirty-five dollars.

'December 26th, 1860.'

'Received on the within note \$50 49, it being the interest on said note up to date. January 4th, 1863.'

'I assign the within note to Jesse Dalton, for value received, conditioned that if the debt is repudiated by law or scaled down, I will make good to the said Jesse Dalton one-half of his loss thereby. September 18th, 1865.

[Signed]

'JAMES P. DOROUGH.'

The amendment was allowed and defendants excepted.

It appeared, from the evidence, that James P. Dorough, in the fall of 1865, traded the note sued on to Jesse Dalton in part payment for a tract of land; that on September 21st, 1867, the trade was rescinded and the note was to be returned to Dorough, but Dalton could not find it and pronounced it lost; that Dalton agreed that he would have a copy established, and employed John C. Reed, Esq., for this purpose; that just before the October Term of the Superior Court of last year, the original note was found and turned over to the usee by Mrs. Dalton, Jesse Dalton having died; the copy when established was to have been delivered to Dorough; that when the rule *nisi* on the proceedings to

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establish the lost note was served, suit was commenced on said note in the name of Dalton, by consent of both Dalton and Dorrough; that Dorrough paid no taxes on the note while it was in the possession of Dalton or of his estate.

The jury returned a verdict for the plaintiff for \$500, principal, with interest from January 4th, 1863.

The defendants moved for a new trial upon the following grounds, to-wit:

1st. Because the Court erred in allowing the amendment hereinbefore set forth.

2d. Because the Court erred in charging the jury as follows, to-wit: "That a promise or undertaking to do a thing may be a valid consideration, and that if Dalton, in consideration of the reconveyance to him of the land by Dorrough, promised to establish a copy of the lost note and to deliver the same when established to Dorrough, this promise of Dalton, and not the lost note, was the consideration of the rescission. Dorrough could have enforced this promise of Dalton just as a man could enforce a legal promise of another to make and deliver so much cotton, or recover damages equal to the value of the cotton. Had Dalton refused or failed to perform his promise, Dorrough could have recovered from him damages to the amount of the value of the note. There is a difference between selling or conveying title and a promise to sell, reconvey or deliver. Mr. Reed contends that only a contract to sell or deliver has been promised, and Mr. Mathews that a contract or sale, in effect, of the note was made so as to pass title, though the note was not to be delivered until a future day."

3d. Because the Court erred in charging the jury as follows, to-wit: "That the consent of Dalton and Dorrough could put the title to the note in both or either, and that both agreed that Dalton was to proceed in his own name to establish a copy, and agreed that suit should be instituted in his own name on the note, and if both further agreed that the note was to be delivered up when established by Dalton to Dorrough; that this agreement and consent kept the

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note in Dalton until the found original was restored to him. The suit could proceed in Dalton's name, and Dalton was the legal owner of the note, for the benefit of Dorrough, and that Dorrough would have power to bargain with the note, and that Dorrough might have released Dalton himself from the contract which he testifies was made between him and Dalton. The Court goes further, and charges you that if you believe from the evidence, that the note on the rescission of the contract of sale of land was sold or reconveyed to Dorrough, and delivered at a future day, the title passed to Dorrough, and he should have paid the taxes thereon, for the Court charges that title to personal property without present delivery can pass by sale. The difference is this, that though the sale or reconveyance of the note would have repassed title to Dorrough without delivery, a promise only to deliver when the note should be found or copy established, passed no title to Dorrough; for if after finding or establishing the note Dalton had failed to deliver, the title would have remained in him, Dalton, and Dorrough would have had redress against Dalton for a violation of his contract to deliver. The Court charges, that to have made a sale or reconveyance it was necessary to have used such words, but there must have been something equivalent thereto. The Court charges that the mere promise to reconvey or deliver, when the note has been found or copy established, is not, of itself, a sale or reconveyance, as would have vested title in Dorrough before delivery."

Because the Court erred in refusing to charge the following request without modification, to-wit: "If the jury believe from the evidence, that the lost note was the contract given by Dalton to Dorrough, for the land purchased by Dalton, from Dorrough, and deeded September 1867, then the title to the lost note vested in Dorrough, and it was his duty to pay taxes on it, and if they believe that he did not pay taxes on it as required by law, they should find for the defendants." To which request the Court

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added the following modification : "If you believe, from the evidence, that Dalton only promised to deliver the lost note when found or established, and that this was the promise or agreement between the parties, then such promise, as has been already charged, is the consideration of the land deeded. But if you believe, from the evidence, that the lost note was given for the land, then it was the consideration, and the title to the lost note vested in Dorrough, and he should have paid taxes on it from the time of making such deed, until it was delivered to him since the finding."

5th. Because the Court erred in refusing to charge the following request, without modification, to-wit: "If the jury believe, from the evidence, that Dalton promised Dorrough to establish a copy of the lost note, that promise did not prevent the title to the lost note vesting in Dorrough the moment the land was deeded to Dalton, for which the lost note was given." To which the Court added the following modification: "that though the promise mentioned in this request did not prevent the title to the lost note from vesting in Dorrough, yet on the other hand it did not vest without more. As already charged it required more than such promise to vest title."

6th. Because the verdict of the jury was contrary to law and evidence.

The motion for a new trial was overruled by the Court and defendants excepted, and assign error upon each of the grounds aforesaid.

J. D. MATHEWS, for plaintiffs in error. The Court erred in allowing the amendment: Code, secs. 3906, 3910, 3429, 3430. The note was Dorrough's property during the years 1868, 1869, 1870, and he should have paid taxes thereon Code, sec. 2712. The non-delivery of the note did not prevent the title from passing: 31 Ga. R., 143; Code, secs. 2557, 2602.

JOHN C. REED, for defendant. The amendment was proper: Code, sec. 3906; Story Prom. Notes, 57; 18 Ga

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R, 465; *Ibid.*, 738. Delivery essential to sale: Code, sec. 2602. Note payable to bearer negotiable by transfer: Code, sec. 2733.

MONTGOMERY, Judge.

1. It is too late, in our practice, to object to amendments to pleadings upon mere technicalities. The legal effect of the lost note and the substituted copy sued on are identical. No new and distinct cause of action—no new and distinct parties. The amendment was properly allowed: Code, 3429, 3430.

2. Whether Dorough should have paid the taxes on the note after the rescission of the land trade, and before delivery of the note to him, depends entirely on whether the intention of the parties was to pass the title of the lost note to Dorough at the date of the rescinding contract. There was evidence to show such was not the intention, and the jury have so found. Indeed, it would have shown very little shrewdness in Dorough's part to divest himself of the title to the land and take the risk of the note having passed into other hands and been by them collected. True, he might have collected the amount from them, if they were able to pay, but suppose they were not?

Judgment affirmed.

JOSEPH J. PRINTUP, plaintiff in error, vs. DAVID B. BARRETT, administrator, defendant in error.

When A loaned money to B, to be used by B in rebuilding a certain mill of B's, which had been destroyed and was being rebuilt, and it was understood that A was to have a lien on the mill to secure him, but no writing or other written memorandum was made, except the giving of notes for the money, and there was no charge of accident, fraud or mistake by which the execution of such a writing was prevented:

Held, That after B's death, on a bill to marshal his assets, equity will not set up in favor of A a lien on the mill, to the prejudice of the other creditors of B.

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Equity. Bill to marshal assets. Lien. Parol evidence. Before Judge PARROTT. Gordon Superior Court. February Term, 1872.

David B. Barrett, as the administrator upon the estate of A. P. Bailey, deceased, filed his bill against Joseph J. Printup and others, creditors of said estate, for the purpose of marshaling the assets. Printup, in his answer, set up that the complainant's intestate was indebted to him in the sum of \$2,893, besides interest on certain promissory notes for securing the payment of which he claimed a lien on the Oothcaloga Mills, by virtue of an understanding with said intestate, that if defendant would let him have the money to rebuild said mills, said mills and mill seat should stand good for the sum advanced, and that defendant should have a lien on said property for the same.

C. D. McCutchen, Esq., was appointed Master in Chancery, and the claim of said Printup referred to him. He made the following report:

"J. J. Printup's four notes are allowed as follows:

"Note for principal sum of \$1,632, with interest from 1st of May, 1866.

"Note payable in gold for \$200, with interest from 1st of May, 1866.

"Note for principal sum of \$261, with interest from 7th June, 1866.

"Note for principal sum of \$800, with interest from 18th December, 1865.

"The said gold note of \$200 may be discharged in currency by adding ten per cent. to the principal and interest for the premium on gold.

"I find that these notes of J. J. Printup were given by A. P. Bailey for cash borrowed to be used in and about the construction of the mills known as the Oothcaloga Mills, and that the money was so used, but the testimony did not satisfy me that there was ever any definite or distinct understand-

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between Bailey and Printup, that Bailey was to give any mortgage or lien to Printup on the mills to secure the payment of the notes; no such lien was in fact ever executed, the lien claimed by him on said mill property is not allowed and his claims are to grade only as promissory notes." Printup excepted to said report. A jury was impaneled and the issue thus formed.

Defendant introduced the notes above set forth, and offered evidence by E. D. Hudgins that said A. P. Bailey came to his house in the latter part of the spring or first of the year of 1866, and said that he had gone as far as he could in selling his mills on Oothcaloga creek, which had been burning during the war, unless he could find a man who would have some money; that he had been riding about to find one, but had failed; asked witness if he knew of any one from whom he could get \$2,000 or \$3,000; said that he could find any one who was willing to let him have the money, he would give a lien on the mills and mill property to secure the debt; witness told him that he thought if he had some money, and probably he might get it from Bailey said he would go to see him, and if defendant let him have the money he would give him a lien on the mills and mill property to secure him, and if necessary, make a mortgage thereon; that Bailey went off in the direction of Printup's, and in the evening of the same day came home towards defendant's, and told witness that he got \$2,000 from defendant, but had very hard work to get it, and could only obtain it by agreeing to let defendant have a lien on said mills and mill property, and that defendant would not let him have the money without an understanding agreement that he was to have said lien to secure the payment of the notes; that he felt thankful to defendant for letting him have the money on these terms, as it would enable him to go on with his mills.

Defendant was objected to upon the ground that a lien on the mills could not be created and proven by parol contract.

and agreement. The objection was sustained, the excluded and defendant excepted.

The defendant offered to prove substantially the missions made by Bailey by the witnesses, J. M. M. Anderson, J. F. C. Martin, James Staggs, Chamolin, Jesse Monon, and Vanhorn. I jection made the evidence was excluded and deferred.

The defendant having no further evidence the Court an order confirming and allowing said report of the in Chancery, making the same a part of the decree defendant excepted.

The defendant excepts and assigns error upon each grounds aforesaid.

W. H. DABNEY, for plaintiff in error.

DAWSON A. WALKER, by brief, for defendant. land is an interest in or concerning it and must be ing: Code, sec. 1940. This is not an implied trust sec. 2290. Nor is it an express trust: Code, 1 Even if fraud were charged it is doubtful whether sustain the claim made here: 6th Ga. R., 599. omits to take a writing he must submit to the court 2d Story's Eq., 768; 1st Vernon, 151; 1st Bro. C Hil. on Mor., 453; Coote on Mor., 222.

McCAY, Judge.

We have examined the cases referred to as to claim set up by the plaintiff in error. But not as far as is necessary even to furnish a principle this claim can be based. In the case of *Ki Thompson*, 9th Peters, 204, the person claiming in possession, claiming the property in good faith and had expended money to improve it. At cases of a claim of lien on this ground. ' English cases where a lien has been allowed

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on claiming it can be said to stand within the reason-
 able giving a vendor of real estate a lien where he has
 security. But as our Code has abolished this ven-
 der, it seems to follow that, although liens which only
 sustained because they come within the equity of the
 lien ought to fall with it. If the greater—the
 right—does not exist, can it be said that the other does?
 I do not, therefore, see how this lien can be sustained on
 principles of equity.

the defendant, in his answer setting up this lien,
 alleged that it was agreed there should be a written
 agreement—that his money was advanced with this agree-
 ment—that, by some fraud of Bailey or by some acci-
 dent a written mortgage was prevented from being exe-
 cuted there would be some ground to stand on. Fraud or
 accident opens the door for a reply to the statute of frauds.
Price vs. Cutts, 29th Georgia, 147. But here is no
 fraud nor any such obligation. It is true, one of the
 statutes states that Bailey told him he was to give a mort-
 gage to Mr. Printup, who is presumed to have stated his
 strongly in his answer as he could, says nothing of any
 agreement that there should be a *writing*. And even if this
 satisfied the element of fraud or accident would still be
 satisfied. The agreement may have been had, that the written
 agreement was to be given, and the failure to have it done been
 neglect of both parties. The statute is imperative,
 mortgages and express trusts must be in writing: Ir-
 revised Code, sections 1945–2284. Equity will only
 when the setting up of the statute would be to pro-
 duce or prevent relief against an *accident*. Neglect—
 as to one's own business—mere failure to see to it
 that an agreement is made and *signed*, as stipulated, is not
 an accident as equity will relieve against. It does not
 take the aid of the sleeper, but of him who, though
 he has been entrapped by fraud or been prevented from
 his agreement put into writing by inevitable accident,
 is not affirmed.

Stokes vs. The State of Georgia and the County of Lee.

GILBERT M. STOKES, plaintiff in error, vs. THE STATE OF GEORGIA AND THE COUNTY OF LEE, defendants in error.

1. A sale of the land by the assignee of a bankrupt does not divest the lien of the State upon the land for taxes due on it, even though sold by the assignee, free of encumbrance.
2. An execution issued by the tax collector for the unpaid taxes against the land, which has not been returned by any one, describing it as the property of the persons who last returned it, is valid against the land, although such persons may no longer be the owners of it, and may not have owned it at the time the law fixes the liability for taxes, to-wit: the first day of April.

Assignee's sale. Bankrupt. Lien of tax *fi. fa.* Before Judge CLARK. Lee Superior Court. April Adjourned Term, 1872.

An execution, in favor of the State of Georgia and county of Lee, for the tax of 1868, due on the "Bryan plantation," amounting to \$205, against Hunt and Bryan, was levied in August, 1869, upon that place. A claim was interposed by Gilbert M. Stokes to said property. Upon the issue formed on the trial of the claim, it appeared that Goode Bryan, one of the defendants in *fi. fa.*, was adjudged a bankrupt on February 20th, 1868, and discharged on December 4th of the same year; that William Oliver was appointed assignee, and a deed made to him by the Register in Bankruptcy on March 12th, 1868, conveying all the property, real and personal, of said bankrupt; that the Bankrupt Court, by order dated June 9th, 1868, directed the sale of the "Bryan plantation," free from encumbrances; that said plantation was duly sold, and a deed made by said assignee to Thomas Scrathin, on July 9th, 1868; that said Scrathin conveyed said property to claimant by deed of same date.

The Court instructed the jury, "that if it appears that tax was assessed upon this land for the year 1868, as the property of Hunt and Bryan, then the Bankrupt Court has no power to divest the lien of the taxes on the land in favor of the State, and that no sale or order of said Court can

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interfere with the right of the State to collect said tax, and that said land, in whosoever's hands it might be, was still liable for the tax."

The claimant requested the Court to charge to the contrary, which was refused. To the charge, as given, and to the refusal to charge, plaintiff in error excepted and assigns said rulings as error.

HINES & HOBBS; G. J. WRIGHT, for plaintiff in error.

LYON & IRVIN, for defendant.

MONTGOMERY, Judge.

1. It has been said by a Judge of a United States Court that, "the power of taxation is a sovereign political power, and a branch of the power of eminent domain:" Brightley's Fed. D., 158. Georgia expressly retains this power over all property in the State, and follows the property for the payment of her taxes, in whosoever hands found. The taxpayer cannot dispose of his property so as to divest her of this right: Code, 809, 810, 811. The bankrupt law does not attempt to deprive a State of this power. True, it makes provision for the payment of the State taxes, if the State choose to come into the Bankrupt Court and claim them, but she cannot be compelled to come in. Hence, the assignee, by sale of a bankrupt's property, cannot divest the right of the State to enforce the payment of her taxes on the property, wherever it may be found.

2. If it is true that the property is bound for the taxes, it makes very little difference who the owner of that property is, or how a tax execution describes it, so it is done with sufficient definiteness to enable the levying officer to ascertain the property.

Judgment affirmed.

Mumford *vs.* King.

S. MUMFORD, plaintiff in error, *vs.* JAMES F. KING, executor, defendant in error.

A plaintiff is a competent witness to prove the payment of taxes on the debt sued on, though the other party to the contract may be dead. (R.)

Evidence. Relief Act of 1870. Party as witness. Before Judge SESSIONS. Wayne Superior Court. April Term, 1872.

For the facts of this case, see the decision.

JOHN D. RUMPH, by brief, for plaintiff in error. The plaintiff was a competent witness: Act of October 13, 1870; 37 Ga. R., 586, 623, 650.

J. S. WIGGIN; J. C. NICHOLS, represented by NEWMAN & HARRISON, for defendant.

WARNER, Chief Justice.

This was an action brought by the plaintiff against the defendant as executor on an open account. The plaintiff had filed an affidavit of the payment of taxes, as required by the Act of 1870. On the trial of the case, the plaintiff offered to prove the payment of the taxes for the purpose of keeping his suit in Court, as required by the provisions of the before recited Act. The defendant objected to his doing so, on the ground that his testator, one of the original parties to the contract sued on, was dead. The Court sustained the objection and rejected the evidence; whereupon, the plaintiff excepted. In our judgment, the Court erred in rejecting the evidence of the plaintiff as to the payment of taxes on the debt. The plaintiff was not offered to prove anything in relation to the contract or cause of action in issue on trial, but was simply offered to prove a fact required by the Act of 1870, to keep his case in Court—a matter outside and wholly independent of any contract made with the

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ator, or the merits of the cause of action in issue or on trial between the parties. The evidence offered was to prove a *condition precedent*, required by the Act of 1870, to enable the plaintiff to maintain his suit in Court.

Let the judgment of the Court below be reversed.

SAMUEL J. URQUHART, plaintiff in error, vs. MARY J. URQUHART, defendant in error.

1. A married woman may sue out a distress warrant for rent of her separate estate without joining her husband or next friend.
2. If an affidavit is made for a distress warrant, for rent due in specifics, which does not aver the value of the specifics, but upon the trial of the issue formed by the counter-affidavit of defendant before a Justice of the Peace, the value is proved and substantial justice has been done, a *certiorari* should not be granted for want of averment of the value of the specifics, or for allowing such value to be proved in the absence of any averment of value.
3. Upon an issue formed to try whether any rent is due on a distress warrant, questions asked a witness, as to whether defendant ever owned the land, and as to how he came in possession of it, may have been properly ruled out. If the object was to show that the defendant owned the land during the time for which the rent is alleged to be due, the record should go further, and show affirmatively that evidence tending to prove that fact was ruled out.
4. The evidence offered by plaintiff sustains the judgment, and the mere inversion of the order of admitting the proof will not warrant the issuing of the writ of *certiorari*.

Distress warrant. *Feme covert*. Title. Specifics. New trial. Before Judge HARRELL. Early county. At Chambers. March 22d, 1872.

Samuel J. Urquhart presented a petition for *certiorari* to Judge HARRELL containing, substantially, the following allegations: That on March 9th, 1872, at a Justice Court for 40th District, Georgia Militia, there came on to be heard issue on a distress warrant, in which petitioner was defendant and Mary J. Urquhart plaintiff; that petitioner

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moved to quash the affidavit and warrant on the following grounds, to-wit :

1st. Because the warrant was sued out in her own name (Mary J. Urquhart's) without the joinder of her husband.

2d. Because the affidavit and warrant did not set forth any amount in dollars and cents as due, but simply stated that the defendant was due plaintiff four or five hundred pounds of lint cotton.

The Court overruled the motion and petitioner excepted.

The Court further ruled that the *onus* was on petitioner to show that he was not indebted to plaintiff, to which petitioner excepted.

Y. T. Urquhart, a witness upon said trial, was asked by petitioner if he (petitioner) ever owned the land for the rent of which the distress warrant was sued out? Also, as to how he (petitioner) came into possession of the land? The Court ruled out these questions, upon the ground that they went to show title, to which petitioner excepted.

The value of cotton was proven at the time the rent is alleged to have become due.

Judgment was rendered for the plaintiff. The writ of *certiorari* was refused and plaintiff in error excepted.

R. H. POWELL, for plaintiff in error.

No appearance for defendant.

MONTGOMERY, Judge.

1. This Court has more than once decided that a married woman, as to her separate estate, stood upon the same footing (with one or more exceptions not necessary to notice here) with a *feme sole*. Hence, she may, without the intervention of a *prochein ami*, sue out a distress warrant for rent of her separate estate, and that without joining her husband.

2. In suits upon all contracts for the payment of specific the value of the specifics ought, regularly, to be alleged and proved. But in a Magistrate's Court, where, in such a suit

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no averment of the value, but the proof of value is made, the absence of any averment of value is no bar *certiorari* where substantial justice has been done to the parties.

There is not enough in this record to show us the relevancy of the questions asked. Y. T. Urquhart, and which were ruled out. If the questions were intended to prove the time the defendant occupied the land, and at the time he was sued for rent, he was the owner of the land, the evidence was improperly ruled out. But that was the object, we can only guess at it. The record does not show it. The defendant may have once owned the land and yet during the time for which he is sued for rent he has been plaintiff's tenant.

The magistrate required the defendant to show that he was indebted to the plaintiff before calling on the plaintiff to make out her case. This was error; and had the court given judgment for the plaintiff on the ground that the defendant had failed to prove that he did not owe the plaintiff, the ruling of the magistrate must have been reversed. The court afterward required plaintiff to go into her proof, and she did, in rebuttal, as it were, make out such a case, but we do not think this a sufficient ground for sending the case back. It is a mere inversion of the order of admitting the proof. The granting of the writ of *certiorari* is not an error. The judgment is affirmed.

CENTRAL RAILROAD AND BANKING COMPANY, plaintiff in error, vs. LEWIS GRANT, defendant in error.

CENTRAL RAILROAD AND BANKING COMPANY, plaintiff in error, vs. PATRICK O'HARA, defendant in error.

The company is not liable for injuries sustained by laborers in the employ of a contractor who was working for said company, though it furnished implements and materials for the performance of the work. (R.)

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Railroads. Contractors. Liability to sub-contractors. Running of cars. Before Judge COLE. Bibb Superior Court. October Term, 1871.

Lewis Grant and Patrick O'Hara brought separate actions on the case against the Central Railroad and Banking Company for injuries sustained. The two cases were heard together in the Superior and Supreme Courts. The defendant pleaded not guilty.

It appeared from the evidence that plaintiffs were employed by a Mr. Names, as overseer of a gang of men; that plaintiffs were engaged in filling in an embankment with a dirt car when the accident happened; that the dirt car fell from a trestle; that the laborers had been working with a barrow, but were compelled to change to the dirt car, on account of it becoming necessary to go very far out on the trestle; that the trestle gave way and the car fell off, injuring plaintiffs severely; that the car, at the time of the injury, was being hauled by two mules, who walked on the ground below, being attached to the car by a long rope; that Mr. Wadley, the president, saw the trestle when it was being built; that Mr. Adams was the contractor for the work which was being done for defendant; that plaintiffs were paid by Names, and defendant had nothing to do with hiring them; that the dirt car, the mules, the driver and the trestle work belonged to the defendant; that the work was let out by the defendant to a contractor, the former agreeing to furnish track, trestle and motive power, except barrows; that defendant had no control over the mules, cars or men.

The jury returned a verdict for the plaintiffs. The defendant moved for a new trial upon the following grounds to-wit:

1st. Because the Court erred in its charge to the jury, in this, that "if it was the contract that the defendant was to furnish to the contractors a safe and sufficient track, cars and motive power to move the dirt, and the accident resulted from plaintiff from an insecure, insufficient and unsafe track;

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otive power, then the defendant is liable to the plaintiffs for the injuries sustained by them, if the injury was the result of furnishing unsafe track, car," etc.

. Because the verdict of the jury was contrary to the ruling charge of the Court, "that if they should be satisfied from the evidence, that Names, a contractor, agreed with the defendant to do the work on which plaintiffs were employed when they received the injuries complained of, the defendant agreeing to furnish track, car and motive power and transferring the dirt by the contractors, and for this purpose furnished a car, mules and driver, with instructions to haul the dirt by hand, and not to attach the mules until a horse was attached to the car, and the plaintiffs, with others, employees of the said contractor, in opposition to and in disobedience of the instructions of defendant's agent, attached horses to the car, for the purpose of hauling the dirt, before a rake was attached, and while so using the car, the plaintiffs were injured, and in consequence of such use, then the plaintiffs * * * would not be entitled to recover."

. Because the verdict was contrary to the law and the evidence.

The motion for a new trial was overruled by the Court and no error excepted, and now assigns said ruling as

K. DEGRAFFENREID; LYON & IRVIN; JACKSON, JR. & BASINGER, for plaintiff in error, submitted the following brief: The plaintiffs were not the servants of the defendant, but of one Names, who had the entire supervision and control of the work and the plaintiffs. If the plaintiffs were the servants of the defendant, they could not recover, having accepted the hazards of the work by the contract: *Young & Shields*, 15 Ga., 359. And the injury happened from the running of the trains, and therefore within section 2057 of Code. The plaintiffs having been employed to do this work (in the doing of which the injuries were received by them,) by Names, the contractor,

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and they nor the work being under the direction of the defendant, but under that of Names, are not entitled to recover of the defendant: *Stephens vs. Armstrong*, 2 Selden, Brown vs. Maxwell, 4 Hill, 592; *Vanderhoot vs. Hust* 28 Barbour, 196; *Delmonico vs. Mayor of New York* Sands, 222; *Lacour vs. Mayor of New York*, 1 Duer, Dupratt vs. Mayor, etc., 38 California, 691; *Deford vs. State*, 30 Maryland, 179. The only connection the defendant had with the work was to furnish a trestle, track and motive power, and pay for the work. They did this, and the injuries were received by the plaintiffs by an improper use of car, a disobedience of the orders of the defendant and criminal negligence of Names and the employees themselves. After furnishing the motive power, it was used and controlled by Names and his employees, and not by the defendant. The injury did not result from any fault of the defendant, or any of its agents or employees. The trestle was sufficient, and so was the motive power—the injury resulted from no fault in this. To have justified a recovery against the defendant, it was necessary for the plaintiff to show negligence or fault of some one for whose acts the company was responsible: *Sterl vs. The Southeastern Railway Co.* Eng. L. and Eq., 367.

WHITTLE & GUSTIN; A. O. BACON, for defendant.

WARNER, Chief Justice.

This was an action brought by the plaintiffs against the defendant to recover damages for injuries done to them in the running of the cars of defendant, under the 2979th section of the Code. It appears from the evidence in the case that the defendant made a contract with one Names to furnish an embankment in East Macon for twenty cents per yard. The defendant to furnish track, trestle, cars, mules and drivers. Names employed the plaintiffs to work on the embankment. The mules, car and driver were under the immediate control and direction of Names, the contractor, and while operating.

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be same for the purpose of filling up the trestle with dirt, the car on which the plaintiffs were, ran off, and the plaintiffs thereby were injured. On the trial, the jury found a verdict for the plaintiffs. A motion was made for a new trial, which was overruled and the defendant excepted. In our judgment, under the law defining the liability of the defendant, as a railroad corporation or company, for damage done to persons by the running of the locomotives or cars, or other machinery of such company, the defendant was not liable, in damages, to the plaintiffs for the injury received by them, on a statement of facts contained in the record. The plaintiffs are in the employ of Names, the contractor; under his supervision and direction, in the use and management of the mules, car and driver. The fact that the defendant furnished mules, car, driver and trestle, under the contract with Names to construct the embankment, did not make it liable for the negligence or carelessness of Names in operating and managing the same in the performance of *his contract*. The defendant was not running its cars, within the meaning of the law defining its liability therefor, when the injury was done to the plaintiffs, but Names was running the car in the performance of his contract, made with the defendant, in the construction of the defendant's road, so that the defendant did not run his cars thereon, under his own control and direction, and then the defendant would be liable for damage done to persons by the running of its locomotives, cars or other machinery thereon, unless it was made to appear that the company had exercised all ordinary and reasonable care and diligence.

the judgment of the Court below be reversed.

Woolfolk vs. Plant & Son.

R. F. WOOLFOLK, plaintiff in error, vs. I. C. PLANT & SON, defendants in error.

(WARNER, Chief Justice, did not preside in this case.)

1. A surety whose principal has been adjudged a bankrupt, when sued for the debt on which he is surety, cannot set off against it interest paid by his principal to the creditor, on transactions other than the one out of which the debt arose, on which the surety is sued.
2. To discharge a surety on account of extension of time by the creditor to the principal debtor there must not only be an agreement for the extension, but the indulgence must be for a definite period.
3. The dismissal of a possessory warrant for cotton, (upon failure to find it in the possession or control of the warehouseman with whom it was deposited and against whom the warrant issued,) by the drawee of a draft, who held the warehousemen's receipt for the cotton, as collateral security for the payment of the draft, and at whose instance the warrant issued, does not discharge the accommodation drawer, even though the warehousemen were the acceptors of the draft, and the draft on its face directed the cotton to be sold and the proceeds applied to its payment.

Principal and surety. Usury. Set-off. Indulgence. Accommodation drawer. Before Judge COLE. Bibb Superior Court. October Adjourned Term, 1871.

I. C. Plant & Son brought complaint against R. F. Woolfolk on the following draft:

"\$1,841 71. MACON, GA, November 21st, 1868.
 "Marks and numbers," Without grace, fifteen days after
 J. J. B. 4 to 6 date, pay to the order of I. C. Plant &
 C. W. 2 to 3 & Son, eighteen hundred and forty
 J. & H. 21 to 24 one dollars and seventy-one cents
 J. A. E. 23 to 27 for value received, being an advance
 W.S.K. 16 to 20 on twenty bags of cotton, marked
 and numbered as per margin, which are conveyed to you, and
 which cotton sell before the maturity of this draft and apply
 the proceeds specially to the payment thereof; if not sufficient,
 the balance will be paid by you, and charge to account of
 of Yours, respectfully,

(Signed)

R. F. WOOLFOLK

"To Messrs. WOOLFOLK, WALKER & Co., Macon, Ga."

Written across face of draft, "Woolfolk, Walker & Co."

Credit.—Received of J. H. Woolfolk five hundred dollars on this draft in part payment, and the receipt attached hereto marked W. S. K. is to be considered as returned to him to the extent of the above money so paid. This February 6th, 1869.

(Signed)

LANIER & ANDERSON, Attorneys, etc.

The defendant pleaded, 1st, The general issue; 2d, That his signature was procured to said draft through the misrepresentation of I. C. Plant, one of the plaintiffs; 3d, That the firm of Woolfolk, Walker & Company has paid to plaintiffs large amounts of usurious interest, that defendant is only a surety, that said firm is insolvent, that therefore said usurious interest constitutes an equitable set-off to said claim; 4th, That plaintiffs, after said draft became due, for a valuable consideration, extended the time of payment to Messrs. Woolfolk, Walker & Company, thereby releasing defendant.

The jury returned a verdict for the plaintiffs for the sum of \$1,353 27, with interest from February 2d, 1869.

The defendant moved for a new trial upon the following grounds, to-wit:

1st. Because the Court erred in charging the jury that the instrument sued on was a bill of exchange drawn by R. F. Woolfolk upon Woolfolk, Walker & Company, and that if the acceptors failed to pay it when due, the drawer was bound to do so."

2d. "That if usurious interest had been paid by said Woolfolk, Walker & Company to the plaintiffs upon other transactions between them, R. F. Woolfolk could not set it off as a defense to this action, or plead it as a set-off to the draft sued on, though it was proved that Woolfolk, Walker & Company were insolvent."

3d. Because the Court erred in refusing to charge, as requested by defendant, that "if plaintiffs had given to Woolfolk, Walker & Company time upon the draft sued on

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without the consent of R. F. Woolfolk, who was only an accommodation drawer, he was relieved from liability thereby," and in giving such charge with the qualification, "that the time given must be a specified time, during which plaintiffs could not sue."

4th. Because the Court erred in refusing to charge the jury, as requested by defendant, that "if plaintiffs sued out a possessory warrant for the cotton, under which one of the firm of Woolfolk, Walker & Company was arrested, and such warrant was dismissed without the consent of R. F. Woolfolk, he being an accommodation drawer, he was relieved from liability thereby," and in giving such charge with the qualification, "that to relieve such accommodation drawer, it must be made to appear that the cotton had been seized under the warrant before its dismissal."

It was admitted that Woolfolk, Walker & Company had been declared bankrupts.

WHITTLE & GUSTIN, for plaintiff in error, submitted the following brief: 1. The charge of the Court, that "the instrument sued on was a bill of exchange, drawn by R. F. Woolfolk, and accepted by Woolfolk, Walker & Company, and if the acceptors failed to pay it when due, the drawer was bound to do so," is erroneous, and the verdict of the jury is contrary to the law and evidence. Plant & Son were bound to use every means in their power to secure the application of the cotton to the payment of the draft, Woolfolk having become liable, at least to some extent, upon the representations made by them, and being only a surety under section 2123 of the Code: *Matheson vs. Jones*, 30 Ga., 306. Dismissing the possessory warrant instead of using the means pointed out by law to force the production of the cotton, and extending the time of payment, even indefinitely, were such acts as increased the risk of the surety, and therefore discharged him: Code, section 2126; *Toomer vs. Dickinson*, 37 Ga., 428. 2. The usurious interest paid by Woolfolk, Walker & Company to Plant & Son constituted an equitable

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off, and was a good defense, *pro tanto*, and should have been deducted from the amount recovered: Code, sec. 3084; *decai vs. Stewart*, 37 Ga., 364; *Pope vs. Solomon*, 36 Ga.,

ANIER & ANDERSON, represented by R. F. LYON, submitted the following brief: There is no certificate of the presiding Judge that his charge is correctly set out in the motion for a new trial in this case. We claim, therefore, that the two questions to be considered are: 1st. Did the Court have the right to allow the jury, who had found generally for the plaintiffs, to insert, after they came into Court, the amount of the finding in the verdict? See 17 Ga., 340. 2d. Is the verdict contrary to law and the evidence? The pleas were three in number—first, that the signature of Woolfolk to the draft was procured by the false representations of Plant; second, that Woolfolk, being a surety, had been discharged by negligence given to the acceptors of the draft; third, that the acceptors had, in other transactions with Plant & Son, paid them large amounts of usurious interest, (the plea names the sum whatever,) which Woolfolk claims as an equitable set-off, the acceptors being insolvent. The evidence was, to say the least of it, conflicting as to the first two pleas, and the verdict as to them will not, therefore, be disturbed. As to the third, (the usury plea,) it may be remarked, first, that it is defective to justify any evidence being allowed under it, and second, that Woolfolk, the drawer, was not entitled to it for usury the acceptors had paid in other transactions in which he was not connected: 1 Kelly, 140. The proof showed that the acceptors were bankrupts. If Plant & Son paid them for usury paid, it was a part of their assets in bankruptcy, and belonged to the assignee. If the Court should review the alleged charge of Judge Cole, we cite, in support of his charge relative to the liability of a drawer of a bill of exchange, complained of in the first ground of the motion for a new trial: Ross on Bills, etc., marg. pp., 12 and 13; Byles on Bills, pp. 2 and 3. In support of the charge

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relative to usury, complained of in the second ground of the motion, we cite: 1 Kelly, 140. See, also, what is said above in reference to the right of the assignee in bankruptcy to sue for usury paid. In support of the charges relative to indulgence given the acceptors, complained of in the third and fourth grounds of the motion, we cite: Smith's Mercantile Law, 582, 583; 22 Ga., 385; 30 Ga., 112, 249.

MONTGOMERY, Judge.

If ordinarily a surety is entitled, when sued on the debt upon which he is surety, to set-off usury paid by his principal to the creditor on contracts other than the one sued on, (as to which see *Whitehead vs. Peck*, 1 Kelly, 140; *Mordani vs. Stewart*, 37 Georgia, 364,) he certainly is not entitled to do so after his principal has been adjudged a bankrupt. The fourteenth section of the Bankrupt Act provides that "all debts due the bankrupt * * * shall, in virtue of the adjudication of bankruptcy and the appointment of his assignee, be at once vested in such assignee."

2. Indulgence to the principal, to discharge the surety, must be for a definite period and for a valuable consideration: *Parnell vs. Price*, 3 Rich., 121; *Washington vs. Gay*, 7 S. & Marshall, 522.

3. We do not see how the dismissal of the possession warrant increased the risk of the accommodation in this case. It had failed to perform its office—the cotton was not to be found; nor did it appear that it was "in possession, power, custody or control of the defendant, any agent or friend of his, or any one acting for or entrusted with the same for him." What, then, was to be done? The defendant could not be imprisoned—the cotton was not to be found. The warrant had expended its force and could be of no further service. Its dismissal did no damage. On all the points taken we affirm the judgment.

Judgment affirmed.

R. A. HARRISON, plaintiff in error, *vs.* A. GUILL *et al.*, defendants in error.

. Where an execution was levied upon a lot of cotton which was sold and the money arising from the sale was claimed under a distress warrant for rent of the land, on which the cotton was made, and the Court adjudged the warrant irregular but refused to pass any order disposing of the money until the landlord could procure a new distress warrant, which he did before the adjournment of the Court, and the money was awarded to him :

Id., That this was not error.

. One who rents land and sub-lets it to a third person stands in the relation of landlord to the sub-tenant and may have a distress warrant for his rent.

Landlord and tenant. Distress warrant. Practice. Before Judge ANDREWS. Hancock Superior Court. April Term, 1872.

The issues involved in this case arose on a money rule, and were submitted upon the following statement of facts :

GEORGIA—HANCOCK COUNTY :

"Whereas, R. A. Harrison, of said county, did, at the October Term, 1871, of the Superior Court of said county, obtain a judgment against Mark Johnston for \$148 20 principal, besides interest and costs, upon which execution was issued and levied upon seven hundred pounds of seed cotton, baling four bales ginned and packed, on November 10th, 1871; the same was sold on the first Tuesday in December, 1871, for \$306, which sum is now before the Court in the hands of the sheriff. And, whereas, Sidney C. Shivers did, on November 17th, 1871, sue out his distress warrant, which was levied the same day upon the same cotton by the sheriff, alleging that there was due him, as rent of the land on which the cotton was raised, four bales of lint cotton of the value \$237, besides interest and cost. And, whereas, Alexander Guill did, on November 27th, 1871, sue out and levy, by the sheriff, his distress warrant upon the same cotton, alleging that there was due him as rent of the land upon which said cotton

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was produced, four bales of cotton of the value of \$297, besides interest and costs. And, whereas, T. C. and D. L. Turner did, on November 14th, 1871, place in the hands of the sheriff a *fi. fa.* in favor of said firm *versus* the said Mark Johnston, claiming that said *fi. fa.*, issued upon the foreclosure of a lien for provisions furnished said defendant, in the sum of \$147 16, besides interest, costs and attorney's fees. And on the same day E. P. Clayton & Company placed in the hands of the sheriff of Hancock county their *fi. fa.*, claiming that the same issued upon the foreclosure of a lien against said Johnston, in their favor, for commercial fertilizers furnished, for the sum of \$294, besides interest, costs and attorney's fees. And, whereas, it is agreed between all the parties above mentioned that the land upon which this cotton, so levied upon and sold, was raised, was the property of Alexander Guill, who, for the year 1871, rented the same to Sidney C. Shivers, as will appear by the written contract between said Guill and Shivers, now in Court, and that the said Shivers subsequently, and for the same year, and without the consent of the said Guill, sub-let the land aforesaid to Mark Johnston.

"Now, for the purpose of procuring a distribution of the fund arising from the sale of said cotton, according to the law, and which fund is in the sheriff's hands, all the parties to this agreement, while contending for the priority each of his own claim, and resisting the validity of every other claim, and especially the pleadings upon which said claims are based, have agreed upon the above statement of facts, and, waiving a jury, to submit all questions to the decision of the presiding Judge, consenting that he may hear evidence as to attorney's fees, provided he should hold that the execution which brought the money into Court should not be first paid.

(Signed)

"C. W. DuBOSE,

"Attorney for Guill, Shivers, Clayton & Co., and Turner

(Signed)

"FRANK A. LITTLE,

"JOHN B. JORDAN,

"Attorneys for R. A. Harrison

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son moved to dismiss the distress warrant of Shivers : following grounds, to-wit :

because Shivers was not a landlord, and had no such in the land as would authorize him to distress a sub-

ecause the warrant was such a process as could not ed, having been made returnable to a Justice Court, r an amount beyond its jurisdiction, to-wit : \$297. Court sustained the motion and dismissed the warrant, red the money held in Court until the landlord could is pleadings.

ond distress warrant was substituted in favor of Shi- ich was also dismissed, on motion. A third distress in favor of the same plaintiff, was presented, held id the fund in Court ordered paid to it. To which ounsel for Harrison excepted, and now assign the error.

JORDAN ; F. L. LITTLE, by brief, for plaintiff in 1. *Fi. fa.* can attack distress warrant : 7 Ga. R., 52. relation of landlord and tenant must exist to support warrant : Code, sec. 2253 ; Tay. on Lan. and Ten., . Tenant cannot sub-let : Code, sec. 2253 ; 41 Ga. ; Smith *vs.* Turnley, adm'r, pamph. Dec., p. 85, July 1. 3. Distress warrants of Shivers should be dis- Code, sec. 4010, *et seq.* ; 7 Ga. R., 52. Are not le : 26 Ga. R., 577 ; 6 Ga. R., 159 ; Code, sec. 3453. Court misconstrued the decision in 41 Georgia Re- 5 ; 43 Ga. R., 339. 5. Harrison's *fi. fa.* entitled to 1 counsel fees : 14 Ga. R., 89 ; *Ibid.*, 320.

.. DuBOSE, by brief, for defendant. Sections 2260 3 of the Code construed in 39 Georgia Reports, 17 ; R., 98.

BY Judge.

we not gone into the numerous questions made on etail distress warrants. If the final judgment of the

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Court was right, all these are immaterial. We see no error in the action of the Court in refusing to dispose of this money until the landlord could get his distress warrant into shape. The cotton was made on the land, and the lien of the landlord for his rent was the highest claim upon it: Code, section 2260. As to the actual cultivation of the soil, Guill was the landlord—(see the case of *Burnett & Company vs. Rich*, January Term, 1872,)—and was entitled to the money this cotton sold for. It would be a very lame tribunal, if a Court was compelled to direct money, going properly to one person, to be paid to another, when it was possible, by an hour or two delay, to adjudge it to its right owner. In the distribution of money raised by its own process, even common law Courts sit as Courts of equity, and especially is that true in this State.

Judgment affirmed.

C. LOPEZ, plaintiff in error, vs. FELIX MCARDLE, administrator, defendant in error.

A claim by one partner against his co-partner for an unascertained amount, growing out of partnership transactions, and which can only be ascertained by a settlement of the partnership concerns, is not required, before such settlement, to be given in for taxation. Hence, where a bill is brought to compel such a settlement of a partnership which ceased business without formal dissolution, before June, 1871, it is not necessary for complainant to file an affidavit of payment of taxes on the claim sought to be enforced.

Relief Act of 1870. Tax affidavit. Partnership. Before Judge HARRELL. Muscogee Superior Court. May Term, 1871.

C. Lopez filed his bill against Thomas Brassill for a settlement of the partnership business of the firm of Brassill & Lopez. Pending the suit, the defendant died, and Felix McArdle, his administrator, was made a party. When

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use came on to be tried, the defendant moved the Court to dismiss the bill, upon the ground that the same was founded upon a contract made prior to June 1st, 1865, and no affidavit as to the payment of taxes had been filed, as required by the law. It was admitted that the bill was filed for an account and settlement of a partnership, which was created and existed prior to June 1st, 1865; that the business of said partnership was closed on the 16th day of April, 1865, and that there had been no settlement at any time between the partners.

The Court dismissed the case, and plaintiff in error excepted and assigns said ruling as error.

WILLIAM DOUGHERTY; BLANDFORD & CRAWFORD; B. THORNTON; W. F. WILLIAMS, for plaintiff in error.

L. T. DOWNING, for defendant.

MONTGOMERY, Judge.

This was a bill filed by one partner against his co-partner on account. The business of the partnership was broken by the raid of General Wilson, on the 16th April, 1865. The bill alleges that, by the terms of the partnership, the defendant's intestate received and paid out all moneys of the concern and kept the books; that large profits were made, all of which went into the hands of the defendant's intestate, and that he had never accounted with complainant. The plaintiff denies the partnership, but with that we have nothing to do, as the bill was dismissed, on motion of defendant, for want of a tax affidavit. In considering the correctness of the dismissal, we must assume the allegations of the bill to be true, and if they are, it was the business of the defendant to pay the taxes, by the terms of the partnership, to say nothing of the impossibility of the complainant's making an incorrect return of his interest, with no data to found it upon. The judgment reversed.

Cheeney and Acee vs. Walton.

ISAAC CHENEY and ALFRED L. ACEE, plaintiffs in error,
vs. JOHN H. WALTON, defendant in error.

ISAAC CHENEY and WILLIAM H. MCCROBY, plaintiffs in
error, vs. JOHN H. WALTON, defendant in error.

Where a defendant seeks a new trial, on account of his having been providentially prevented from being present in Court when the judgment was rendered, and thus deprived of the benefit of his testimony, it is necessary that he should show, affirmatively, the facts he could have proven, so that the Court can judge of the materiality of the same. (R.)

New trial. Before Judge JOHNSON. Talbot Superior Court. March Term, 1872.

The two cases above stated were argued together. All the facts necessary to an understanding of the cases are set forth in the decision of the Court.

BLANDFORD & CRAWFORD; J. M. MATTHEWS, for plaintiffs in error.

E. H. WORRILL; B. HILL, for defendant.

WARNER, Chief Justice.

This was a motion for a new trial on the ground that the defendant was absent from the Court when the judgment was rendered against him, on account of the sickness of his wife, and that if he had been present at the trial he could have proved and shown that the plaintiff had not paid the legal taxes chargeable by law on said contract for each and every year from the making or implying of said contract, the income thereof. It appears, from the bill of exceptions, that the plaintiff, on the trial, did prove the payment of taxes, as set forth in his affidavit. The motion for a new trial was overruled, and the defendant excepted. There was no brief of the evidence filed as the rule of Court requires, and the Court may have overruled the motion on that ground.

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ut we think the defendant's affidavit was not sufficient to authorize the Court to have granted the motion. The defendant should have shown to the Court *the facts* which he could prove, going to show the plaintiff had not paid the taxes, and by whom he could prove the same, so that the Court might judge whether the facts would probably change the result if a new trial was granted, and the affidavit of the defendant by whom he expected to prove the facts as to what he would swear in relation to the non-payment of taxes by the plaintiff. In order to get rid of a judgment and have a new trial, the defendant should have shown affirmatively to the Court the facts he could prove, so that the Court could be judged of the materiality of the same; the judgment of the defendant and the judgment of the Court might differ to the effect of the proof which the defendant might offer to the non-payment of the taxes, the more especially when the plaintiff had proved on the trial that he had paid them. Let the judgment of the Court below be affirmed.

THE SOUTHWESTERN RAILROAD COMPANY, plaintiff in error, *vs.* EDWARD L. FELDER, defendant in error.

Where goods are shipped by railway, and arrive at their destination within the usual time required for transportation, and are there deposited by the company in a place of safety and held by them ready to be delivered on demand, their liability as common carriers ceases, unless the custom of trade is shown to be otherwise as to delivery, and that of warehousemen commences.

Notice to the consignee, where the goods arrive on time, is necessary to reduce the liability of the company from that of common carrier to that of warehousemen.

If the goods arrive out of time, and after they have been demanded by the consignee, it might require notice of their arrival to the consignee, and a reasonable time after, to relieve the company from the extraordinary liability imposed by law upon a common carrier.

Common carriers. Warehousemen. Notice. Custom.
 Judge COLE. Houston Superior Court. December
 1871.

The Southwestern Railroad Company vs. Felder.

Edward L. Felder brought assumpsit against the Southwestern Railroad Company for the sum of \$200, besides interest. The declaration alleged that on the day of November, 1870, at Macon, defendant received from plaintiff, for a valuable consideration, six bundles of iron cotton-ties and seven rolls of bagging of the value of \$200, and undertook to transport and deliver the same to James E. Barrett, at Fort Valley, without unreasonable delay, which defendant has failed to do.

The defendant pleaded the general issue, and for further plea "that said goods were shipped on November 5th, and arrived at Fort Valley on that day, and that said goods were unloaded and placed in the depot ready to be delivered when called for; that said goods remained in the depot until November 12th, at night, when the depot, with these goods, was consumed by fire without fault on the part of this defendant.

The case was submitted to the jury upon the following statement of facts:

"It is agreed that the Southwestern Railroad Company is a regularly chartered corporation under the laws of this State; that they have a depot and an agent at Fort Valley, in the county of Houston, and that W. A. Skellie is the agent, and has been regularly served; that said Railroad Company received for shipment on the 4th day of November, 1870, at their depot, in the city of Macon, six bundles of iron cotton-ties and seven rolls of bagging, and that on the 5th day of November, 1870, they were carried over the company's road to Fort Valley, and unloaded and placed in the depot at Fort Valley on that day; that said bagging and ties were consigned to J. E. Barrett, Fort Valley; that on the 11th day of November, 1870, plaintiff sent up money by J. Gordon to pay the freight due said company; that Gordon did on that day pay the freight on these goods, but did not deliver the freight bills to E. L. Felder until the afternoon of the 12th, in Perry, a distance of twelve miles from Fort Valley.

"It is further agreed that the depot was consumed by fire on the night of the 12th of November, 1870, and that the goods sued for in this action were consumed in said depot; that actual notice of the arrival of said goods at the depot in Fort Valley was not given to plaintiff until the evening of the 12th, when the bills of freight were delivered by Mr. Gordon to plaintiff, in Perry.

"It is further agreed that said goods and the freight were of the value of \$151 50.

"It is further agreed that W. A. Skellie, the agent at Fort Valley, went into the main body of the depot at about seven o'clock on the night of the burning without a light or fire of any kind; that there was no evidence of fire discovered by him in the depot; that he then went into the office of the agent in said depot and remained there until about nine o'clock, at which time he left, and that within one half hour after he left, the depot was discovered to be on fire; that the origin of the fire is unknown to defendant, and that the fire originated in the main body of the building, and not in the office of the agent, and is supposed to have originated from spontaneous combustion.

"It is further agreed that the depot was opened as usual on the day of the burning, and that E. L. Felder notified Mr. Barrett, the party to whom the goods were consigned, that he expected the goods some days before the burning, but that (Barrett) had not been notified of the arrival of the goods at the depot."

The jury returned a verdict for the plaintiff for \$151 50, plus interest and costs.

The defendant moved for a new trial upon the following grounds, to-wit:

1. Because the verdict of the jury is without evidence to support it, and is strongly and decidedly against the weight of the evidence.

2. Because the verdict is contrary to law.

3. Because the Court erred in charging the jury as follows, to-wit: "That defendant's strict liability as a com-

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mon carrier continued a reasonable length of time after the goods had arrived at the place of destination to enable plaintiff to remove them, and that it was for the jury to determine whether seven or any other number of days were reasonable. If, in the opinion of the jury, the length of time that these goods remained in the depot after their arrival, was unreasonably long, and that plaintiff could and should have removed them at an earlier date, then defendant was not liable; but on the contrary, if the time they remained in the defendant's depot was not unreasonable, then defendant was liable and the jury should so find. That, in the opinion of the Court, it was not the duty of the railroad company to send notice to parties of the arrival of goods at their depot; this would be an unreasonable requirement, such as the law does not impose on carriers of this kind. Railroad companies as common carriers, however, are bound as such after goods have been unloaded from the cars for a reasonable length of time, and what is a reasonable length of time is a question for the jury alone to determine."

4th. Because the Court erred in refusing to charge the jury as requested, to-wit:

1st. "That if the jury were satisfied, from the evidence in this case, that plaintiffs shipped goods over the defendant's road and that said goods arrived safely at the place of destination and were then unloaded from defendant's cars and placed in the depot, and there remained for six or seven days, ready to be delivered when called for by plaintiff's agent, and were after that time consumed by fire, then their strict liability as common carriers ceased."

2d. "That if defendant's liability as common carrier terminated, then they were only liable to exercise ordinary diligence in taking care of the goods, and if the fire occurred without carelessness on the part of defendant and consumed the depot and with it the goods sued for, then plaintiff was not entitled to recover."

In a note, the Judge states that this second request was given in charge as asked.

The motion for a new trial was overruled by the Court, and defendant excepted and now assigns said ruling as error.

W. S. WALLACE, for plaintiff in error.

No appearance for defendant.

MONTGOMERY, Judge.

Very little need be added in this case to the judgment of the Court as contained in the head notes. The decision as to the necessity of notice to the consignee may seem, at first glance, to conflict with *The Rome Railroad Company vs. Union, Cabot & Company*, 14 Georgia, 277. The question of notice to the consignee was not in that case. It was *res inter alios acta*, and the Court held that, although the railroad made a wrong delivery of the freight sued for, yet the company were not liable for a conversion until demand and refusal. Judge LUMPKIN's remarks as to the necessity of notice are merely incidental. At all events, such is not now the custom of trade," and we think section 2044 of the Code dispenses with the notice in this case and relieves the plaintiff in error of liability as a common carrier after transportation of the freight within the accustomed time, a deposit in a place of safety, and the holding of it there ready for delivery on demand.⁴ If a different custom prevails the consignee should show it. The liability of warehousemen continues till delivery, but there is no pretence that the plaintiff in error can be held responsible under the law applicable to bailees of that class. If the goods had arrived at the time, and after demand made by the consignee, the company might then be liable as common carriers until notice to the consignee and for a reasonable time after.

Generally parties shipping goods by railways should inform themselves as to the time of arrival of the transporting company and govern themselves accordingly. To require railroads to give notice to every consignee of the arrival of his goods would impose an unnecessarily heavy burden upon them with no corresponding benefit to the consignee, who

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certainly should keep himself informed as to the transportation of his property when it can be so easily done.

Judgment reversed.

DAVID COHEN, plaintiff in error, vs. GEORGE A. WEIGLE, defendant in error.

The motion for a new trial in this case was properly overruled, the verdict not being decidedly and strongly against the weight of evidence, and the discretion of the Court as to the continuance, not having been, in our opinion, abused.

New trial. Continuance. Before Judge GIBSON. Richmond Superior Court. January Term, 1872.

George A. Weigle instituted proceedings in the Superior Court of Richmond county to establish a note alleged to have been made by David Cohen, as follows, to-wit:

"\$150. AUGUSTA, GA., June 15th, 1869.

"One day after date I promise to pay to the order of George A. Weigle one hundred and fifty dollars for value received, with interest from date.

"(Signed)

D. COHEN."

The defendant pleaded the general issue and *non est factum*.

The following testimony was introduced upon the trial:

Irwin Hicks, sworn: Called on Cohen for Weigle, to collect a note; the amount was \$150; Cohen promised to pay the note; this was in 1869, think some time in the fall of that year; thinks Cohen paid Colclough a hat on the note; thought the copy attached to petition was same as the note he presented. Witness was shown a draft as follows:

\$300.

AUGUSTA, August 12, 1867.

On the 15th of November next, pay to the order of George Weigle three hundred dollars, value received and charge the same to account of

(Signed)

D. COHEN.

To M. COHEN.

Accepted.
M. COHEN.

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Don't recollect if such paper was ever in his possession; can't say if it was drawn by David or Morris Cohen; the signature might be taken for either a D or an M; this paper is not a note; can't swear positive that the copy note attached to petition is like the note he presented; can't say what year it purported to have been drawn in, but think it was 1869.

George Weigle, sworn: David Cohen gave him a note for \$150; thinks the copy attached to petition is a substantial copy of note given him; sold to David Cohen a roan horse, and his brother Morris was his security; D. Cohen did not wish his brother to know that he was going to pay part of the purchase, to-wit: \$150; sold the horse for \$450; Morris Cohen gave me two notes for \$150 each, and David Cohen for \$150 more, making the \$450. [Here defendant's counsel exhibited to witness the *draft* shown to and mentioned in witness Hick's testimony.] This draft is drawn by David Cohen on Morris Cohen, and payable to his order; it is for \$300; thought he, Morris Cohen, had given two notes to him; witness never had but one transaction with either Morris or David Cohen where any note or other valuable paper was given him. After looking at the draft witness is not prepared to say that the copy attached to his petition is like the paper given him by D. Cohen.

DEFENDANT'S TESTIMONY.

David D. Macmurphy, sworn: Witness is Clerk of Richmond Superior Court; petitioner's counsel, Mr. Foster, sent witness word some months ago to dismiss this case; he did not do so because the costs were not paid.

H. Clay Foster, sworn: Called upon A. D. Picquet, attorney for Cohen, for an acknowledgment of service after the case had been passed in the Superior Court and that Court adjourned, in order to get the case in the City Court, and thereby avoid the delay consequent upon the next term of Superior Court; he told Mr. Picquet he would order the case in the Superior Court dismissed, and as soon as he returned to his office sent word to the Clerk to dismiss the case, and be-

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lieved that the case had been dismissed, until after the Judge of the City Court had decided that there was no jurisdiction in the City Court; after the adjournment of the City Court went to the Clerk's office with petition in same case to begin *de novo*, when the Clerk informed him that the original case had not been dismissed, as the message he received was to dismiss the case of Weigle vs. Cohen, the case sounding in re George A. Weigle; then told the Clerk if he had not dismissed it to let it remain on the docket; met Picquet a few days afterward and told him the Clerk had failed to dismiss the case and he had told him to let it remain; this was ample time to have commenced anew in the Superior Court for this term, and had Mr. Picquet objected would have then had it dismissed and commenced over, but making no objection witness thought he had none, and hence he allowed it to remain.

Augustus D. Picquet, sworn; Witness is counsel for defendant; after the June Term last of the Superior Court had adjourned to meet in October last, H. Clay Foster, Esq., called at my office to get me to acknowledge service in the same case to the City Court, when he stated that he had dismissed or would dismiss in the Superior Court; witness never would have made such acknowledgment of service except with the understanding that the case was not pending in this Court; witness would not have put his client to the trouble and expense of defending the same cause of action in two Courts at the same time.

The draft copied in witness Hick's testimony was put in evidence.

David Cohen, sworn: Is the defendant; never gave the plaintiff a note of which the one sought to be established is a copy; never gave him any note whatever; the transaction plaintiff speaks of, about his brother and he buying a horse occurred in 1867; plaintiff drew a draft on defendant which he accepted; it was drawn in August of that year, and payable in November following; the draft was for \$150.

The jury returned a verdict establishing the copy of

at note as the original. - The defendant moved for a new trial, upon the following grounds, to-wit:

1st. Because the Court erred when this case was called, in not allowing the defendant's counsel a reasonable time to move that the petitioner, through his counsel, had dismissed the above rule in this Court, and had obtained thereby an acknowledgment of service on the same rule in the City Court of Augusta; that said dismissal occurred between the regular Term, last, and the Adjourned Term of this Court, in October last, the rule being returned to the June Term, 1871, of this Court, but directed petitioner's counsel to go on with the case to the jury. That then defendant's counsel stated to the Court that he had not his witnesses or client present, not believing that petitioner's attorney would call the case up again, after telling him he would dismiss, and obtained an acknowledgment of service in the City Court on the same day, in substance, though it was dismissed in said City Court. The Court erred in not continuing the case, and in saying to defendant's counsel that he would allow him time to get his client here, and the Court directed a bailiff to go for the defendant, or said to defendant's counsel, "send Mr. Davis after me;" Davis being absent, another bailiff was dispatched, who soon returned with the defendant.

2d. Because, when the defendant appeared in Court, and his counsel was preparing a showing for a continuance, the Court remarked that he would require no written showing, and defendant's counsel remarked that he was not prepared to go to trial, on account of the absence of John W. Taliaferro, by whom he expected to show by the records and papers in his office, Clerk of the City Court of Augusta, that this rule had been acted upon in said Court; also, to show an acknowledgment of service on the same, and that he expected to prove by one J. P. Fox that said Fox drew the rule that defendant gave petitioner, and that he, Fox, did draw a note, but a different paper altogether. Petitioner's counsel said he would admit what was expected to

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be proven by Taliaferro, when the Court erred again in directing the petitioner's counsel to proceed to the jury.

3d. Because the Court erred in not allowing defendant to make his showing in writing, when requested particularly to do so by his counsel, in order that the record might be completed as to a showing for a continuance.

4th. Because the verdict was contrary to evidence, or without evidence.

5th. Because the verdict was contrary to law.

6th. Because the verdict of the jury was contrary to the charge of the Court, in this: The Court charged the jury, "that if they find that Weigle is moving to establish a copy of a note payable one day after date, and dated June 1st, 1869, and the evidence shows that Weigle drew a draft on Cohen, and it was accepted by Cohen, the proof is not sufficient to establish the copy presented as a note given by Cohen." Further, the Court charged the jury, that a recovery by Weigle on the copy note presented would be a bar to a suit on a draft, or prevent a recovery on a draft accepted by Cohen of Weigle in the year 1867."

The motion for a new trial was overruled and defendant excepted, and assigns said ruling as error.

A. D. PICQUET, by brief, for plaintiff in error. As to the first exception, he contends that his counsel should have been allowed to show that the case had been dismissed, or that the plaintiff's attorney had created that impression by his management, and cites, as to dismissal of cases: *Mountain Rowland & Ansley*, 30 Ga., 232. And as to agreement between attorneys: *Henderson vs. Merrit*, 38 Ga., 232. As to the second, that it is error for a Court, without motion from either side, to send or direct that a defendant be sent after showing a fixed intention to force a trial, and calculated to prejudice the jury against the defendant. To the third, his counsel should have been allowed to make his showing a continuance in writing. It was the duty of the Court, without leave asked, to have had said showing reduced to writing.

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of 1853-4, pamph., p. 52; Code, sec. 3472. That the writing was a good one, and the testimony of Fox was very material to the issue. Fourth. Verdict contrary to law and without evidence to support it; all the positive evidence was that the paper was drawn in 1867, and not 1869; that as a draft and not a note that Cohen gave Weigle: Pace Mealing, 21 Ga., 464.

I. CLAY FOSTER, for defendant. 1st. The rulings complained of in the 1st, 2d and 3d grounds of error were maturing in the discretion of the Court below, and this Court will not interfere unless abuse is shown: Code, sec. 3472; 40 Ga., 15; 30th, 831. The issue joined was upon a question of fact, viz: was the paper sought to be established as a note or draft? this was matter for the jury, and this Court will not disturb their finding: 29 Ga., 637 (3.) 3d. It is no objection to a verdict, that it is contrary to the charge of the Court, if the charge be wrong: 15 Ga., 253. 4th. When substantial justice has been done, a new trial will be refused: 15 Ga., 339; 37th, 235; 29 Ga., 637 (3.)

McCAY, Judge.

As to the continuance it was in the discretion of the Court, and we can well see how the Judge might think, from the circumstances, it was proper to grant it. There is evidence to justify the verdict. True, it is contradicted by evidence for the defendant, but the jury, doubtless, gave greater weight to the plaintiff's testimony. The Judge was right in refusing a new trial. Judgment affirmed.

Watkins vs. Cason.

WILLIAM H. WATKINS, plaintiff in error, vs. SUSAN CASON,
defendant in error.

C. holds the notes of W., which are not yet due, secured by mortgage. Before they fall due, a judgment creditor of C.'s issues garnishment against W. and obtains judgment against the garnishee for the amount of C.'s debt to him (the creditor), which is less than the amount of the notes. After judgment against the garnishee, but before the notes fall due, they are set apart to C. as personalty, under the homestead laws. On the maturity of the notes, the judgment creditor issues execution against the garnishee (which was levied on his property), who voluntarily pays the amount to the attorney of the judgment creditor. Before the maturity of the notes, the garnishee had written notice that they had been set apart to the payee as personalty, under the homestead laws:

Held, That C. was entitled to foreclose the mortgage for the full amount of the notes. If the money has not passed beyond the control of the Court, it should be ordered to be paid in satisfaction of the mortgage judgment in preference to the creditor's judgment against the garnishee. If it has, C. is entitled to have execution against the mortgaged property, the owner of which must look to those to whom he paid the money for remuneration.

Foreclosure of mortgage. Homestead. Garnishment. Before Judge TWIGGS. Jefferson Superior Court. November Term, 1871.

Susan Cason instituted proceedings against William H. Watkins to foreclose a mortgage given to secure the payment of four promissory notes, dated January 1st, 1870, due twelve months after date, and each for the sum of \$100.

The defendant pleaded that a judgment in garnishment was rendered against him as a debtor of the plaintiff for the sum of \$335 62, which he was compelled to satisfy; that he claims a deduction from plaintiff's demand to the amount aforesaid.

The evidence disclosed the following state of facts: E. Dixon, as trustee, commenced suit against Susan Cason in the Washington Superior Court, and had process of garnishment served upon William H. Watkins, returnable to Jefferson Superior Court. He recovered a judgment against Susan

at the April Term, 1870, of Washington Superior Court, upon which a judgment was rendered against William H. Watkins, garnishee, at the November Term, 1870, of the same Court, for the sum of \$265 27, with interest from April 9th, 1868, and for \$14, costs. Execution issued upon this last judgment and levied upon a house lot as the property of Watkins, on January 4th, 1871, on the same day the *fi. fa.* was settled in full by the payment of 335 62. On December 12th, 1870, the aforesaid promissory notes and mortgage were set apart to Susan Cason in portion of her exemption of personalty, and on the 22d of the same month, William H. Watkins was notified of the fact in writing.

Counsel for the defendant requested the Court to charge the jury, "that the judgment against Watkins in Dixon's case, for the amount of Dixon's *fi. fa.* against Mrs. Cason, and payment of these notes of Mrs. Cason against Watkins for the amount of the judgment in garnishment against Watkins, and the only right in these notes which could be set apart as an exemption of personalty for Mrs. Cason, was the amount due on them, less the amount to be paid Dixon by Watkins, under the judgment in garnishment."

The Court refused the above request, and charged the jury as follows, to-wit:

"I charge you, gentlemen of the jury, that when Mrs. Cason had these notes set apart as her exemption of personalty, they were no longer liable to the judgment in garnishment against Watkins, as a debtor of Mrs. Cason, and Mrs. Cason's lien on these notes and mortgage became superior to all other liens, and if Watkins paid the amount due on them with full notice that these notes and mortgage had been set apart as an exemption of personalty for Mrs. Cason, he was still liable on the notes and mortgage to Mr. Cason for the amount due upon them, the notes and mortgage being the legal right and property of Mrs. Cason, her homestead in them became superior to Dixon's garnishment lien on them."

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The jury returned a verdict for the full amount of the notes.

The defendant excepted to the refusal to charge, and to the charge as given, and assigns the same as error.

CARSWELL & DENNY, by brief, for plaintiff in error. 1. Irrelevant testimony should be excluded: 1 Greenleaf's Ev., sec. 50; 19 Ga. R., 569; 25 Ga. R., 714. 2. Effect of judgment in garnishment: Code, secs. 3230, 3491, 3492; 5 Ga. R., 425; 8 Ga. R., 549; 30 Ga. R., 441.

CAIN & POLHILL, by brief, for defendant. 1. A judgment cannot be enforced against property set apart as a homestead: Const., Art. VII., sec. 1, clause 2; Acts of 1868, p. 27. 2. The money should be distributed according to the priorities allowed by law, in which event the homestead is a superior lien: Code, sec. 3489; 41 Ga. R., 320.

MONTGOMERY, Judge.

We think the Constitution controls this case. Garnishment is but a process by means of which to reach property of a defendant inaccessible to an ordinary execution. It has no greater lien upon the debt garnisheed than an execution has upon property levied on by it, with the qualifications pointed out by statute, not here necessary to be noticed. The garnishee had notice that his debt had been set apart to Mrs. Cason as personalty under the homestead laws, and that therefore, it was not liable to be subjected to the payment of any debt due by her, not in the excepted class. It is pretended that the debt due the garnishing creditor came within any of the exceptions. The garnishee, therefore, paid the debt in his own wrong, and must look to the party to whom he paid the money for reimbursement. If the fact is still within the control of the Court, such direction can be given to it as to protect the garnishee. If the matter has passed beyond the control of the Court, Mrs. Cason is entitled to have her execution against the mortgaged property.

Judgment affirmed.

Lindsay vs. The Central Railroad and Banking Company.

LIAM M. LINDSAY, by his next friend, plaintiff in error,
 . THE CENTRAL RAILROAD AND BANKING COMPANY,
 defendant in error.

re a plaintiff sues for damages sustained from having been pushed
 a car of defendant, while in motion, by a negro, who emerged from
 car and stated that he was in charge of the same; this declaration,
 less brought to the knowledge of the defendant or its agents, who
 had charge of the train at the time, is insufficient to make the defend-
 ant liable for the acts of the negro as its servant. (R.)

railroads. Master and servant. Before Judge COLE.
 Superior Court. October Term, 1871.

on the facts of this case, see the decision.

ISBETS & JACKSON; JOHN B. WEEMS; JOHN RUTHER-
 FORD, for plaintiff in error.

F. K. DEGRAFFENRIED; LYON & IRVIN; JACKSON,
 STON & BASINGER, for defendant.

WARNER, Chief Justice.

his was an action brought by the plaintiff against the
 defendant to recover damages for injuries done to the plain-
 tiff by the defendant, in running his cars on his road and
 unlawfully ejecting the plaintiff therefrom. It appears from
 the evidence in the record that in the year 1864 the defend-
 ant passenger railroad train was backing slowly into the
 passenger depot at Macon, when the plaintiff, who was about
 twenty years old, got on the platform of the second car from the
 rear, when the train was some forty steps from the depot;
 in a moment or two, a negro man emerged from the car
 on the platform on which the plaintiff was standing, and
 asked him what he was doing there? Plaintiff replied, "Is
 anything to you?" The negro said, "Yes, I have
 got off this car," and told plaintiff he must get off; plain-
 tiff told him he would not, and the negro began to shove him
 plaintiff resisted, but the negro succeeded in pushing him

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off, and he fell between the cars, was caught on the track and badly injured and maimed by the wheels; did not know the negro who pushed him off; never saw him before, and has never seen him since; did not know whether he was a mulatto or black; does not know that he was an employee of the company, except from the way in which he acted and what he said. The father of the plaintiff testified, that "he was frequently on the railroad, about the depot, during the time testified about; is acquainted with the habits and custom of the Central Railroad in backing from East Macon to passenger depot; that it was their custom to allow no one but employees on the train, and to keep the cars locked until ready to receive passengers, and their rules were particularly stringent in the then condition of the country; it may be that some persons did sometimes get on the train in East Macon and cross the river on the cars." This is all the evidence going to show that the negro who pushed the plaintiff off the car was the employee or servant of the company.

The defendant, as a railroad company, is liable under the law for any damage done to persons by the running of their locomotives, cars or other machinery of their company, or for damage done by any person in the *employment* and *service* of such company, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence—the presumption in all cases being against the company—and the question is, whether the evidence in the record is sufficient, under the law, to make a *prima facie* case of liability against the defendant for the injury complained of? The solution of that question depends entirely on whether there is any *competent* legal evidence to establish the fact that the negro who pushed the plaintiff off of the defendant's train was their employee or servant at the time the act was done. By the common law if a servant, by his negligence, does any damage to a stranger, the master shall answer for his neglect; but the damage must be done while he is *actually employed in his master's service*; otherwise the servant shall answer for his own misbehavior. By custom

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very person is liable for *torts* committed by his servant, either by his command or in the prosecution and within the scope of his business, whether the same be by negligence or voluntary. The employer is not responsible for *torts* committed by his employee when the latter exercises an independent business, and in it is not subject to the immediate direction and control of the employer: Code, sections 2910-2911. To make the railroad company liable in this case there must be some competent legal evidence that the negro who did the injury to the plaintiff on their train was in the employ of the company as *their servant*. The mere fact that he emerged from the car and said I have charge of this car, and pushed the plaintiff off, was not sufficient competent legal evidence to prove that he was *the servant* of the company; he might have been there without authority, in the same manner as the plaintiff was on the platform of the car; his declarations and acts on that occasion, without more, does not, in contemplation of the law, establish the relation of master and servant, so as to make the defendant liable for his conduct. The fact that it was the custom of the company to keep their cars locked, and to allow no one but employees on their trains when backing down to the passenger depot, does not help the matter, especially as there is no evidence that the negro unlocked the car from which he emerged, and that persons might sometimes get on the train at East Macon and cross the river on the cars. The mere declarations and acts of the negro, unless brought to the knowledge of the company or to their agents, who had charge of their train at the time, is not sufficient, under the law, to make the company liable for his acts as their servant. The relation of master and servant must first be established by competent legal evidence in order to make the company responsible for his conduct. There is no evidence that the negro was ever in the employ of the company before the injury was done—a most significant omission, if, indeed, he was their servant at that time. If it had been shown that the negro had possession of the keys to the cars of the train,

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or had unlocked the one from which he emerged, or was cleaning out the cars, or doing other acts for the benefit of the company, with the knowledge of the defendant's agents who had control of the train at the time, that would have furnished some evidence from which the law would imply that he was an employee and servant of the company; but to hold the company responsible for his acts as their servant, or to allow a jury to do so under the evidence contained in this record, would be to establish a dangerous precedent which we are unwilling to sanction. We, therefore, affirm the judgment of the Court below on this point made in the case, but express no opinion in relation to the statute of limitations.

Let the judgment of the Court below be affirmed.

McCRARY & COMPANY, plaintiffs in error, *vs.* AUSTELL,
INMAN & COMPANY, defendants in error.

When a mortgage of realty in Georgia, is executed in New York before a Commissioner of Deeds only, without any other witness, a Court of Chancery has jurisdiction to reform and foreclose the mortgage.

Foreclosure of mortgage. Reformation. Attestation. Before Judge JOHNSON. Talbot Superior Court. March Term, 1872.

Austell, Inman & Company filed their bill against John B. McCrary and Isaac McCrary, partners, using the firm name of McCrary & Company, containing substantially the following allegations and prayer: That on April 21st, 1870, said McCrary & Company being indebted to complainant in the sum of \$2,688, made their promissory note for the amount, payable to complainants twelve months after date thereof; that on the same day, to secure the payment of said note, said John B. and Isaac McCrary made, executed and delivered to complainants their mortgage and

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certain lands situate in the county of Talbot; that said mortgage deed was executed in the city of New York, in the presence of Edwin F. Corey, Commissioner for the State of Georgia, to take acknowledgment of deeds, etc., resident in said city; that no other witness but the said Corey attested said mortgage deed, for the reason that it was the belief of complainants and defendants that a mortgage executed in the presence of said Corey, as Commissioner as aforesaid, and attested by him as Commissioner, would constitute a legal execution under the laws of the State of Georgia without its being attested by another witness; that since complainants have discovered the mistake, they have requested defendants to take the aforesaid mortgage deed back and to deliver to them one properly attested, which request said defendants have refused; prayer, that the said defendants may be decreed to execute to complainants a mortgage in place of the one therein described, attested in accordance with the laws of the State of Georgia; and, further, to decree that defendants do pay to complainants the sum of money due upon said note in such reasonable time as the Chancellor shall deem proper; and, upon failure so to do, that they be forever foreclosed from all right to redeem said mortgaged premises; that the writ of subpœna may issue.

Defendants demurred to the bill. The demurrer was overruled by the Court, and defendants excepted and now assign said ruling as error.

BLANDFORD & CRAWFORD; WILLIS & WILLIS, represented by W. A. LITTLE, for plaintiffs in error.

E. H. WORRILL; B. HILL, for defendants.

MONTGOMERY, Judge.

"We think the facts of this case show that there was "an honest mistake of the law as to the effect of the instrument on the part of both contracting parties," and that "such mistake operates as a gross injustice to one, and gives an un-

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conscious advantage to the other." The case is, therefore, relievable in equity: Code, section 3067. Equity having acquired jurisdiction to reform, will retain it to foreclose the mortgage.

Judgment affirmed.

C. P. HEARTWELL, guardian, plaintiff in error, vs. EUBANKS TOMPKINS *et al.*, defendants in error.

Where, in an arbitration between the guardian of a minor legatee and the executor of an estate, it was decreed that all the notes of the estate should be turned over to the minor as her property:

Held, That in a pending suit on one of the said notes, proof of this award excused the filing of the affidavit required by the Act of October 13, 1870, and this is not met by proof that there are outstanding debts against the estate.

Relief Act of 1870. Tax affidavit. Minor. Before Judge STROZIER. Dougherty Superior Court. January Term, 1872.

C. P. Heartwell, as guardian of Dollie Tarver, a minor, brought complaint against Eubanks Tompkins, James H. Hill and Benjamin R. Smith, on a note made January 1st, 1860, payable twelve months after date "to H. A. Tarver, executor of C. C. Tarver, executor or bearer," for the sum of \$1,049.

Plaintiff introduced the following evidence, to-wit:

1st. The note sued on.

2d. C. P. Heartwell, who testified as follows, to-wit: That the note sued on is the property of Dollie Tarver, a minor, that in 1863, he, in right of his wife, had a settlement with H. A. Tarver, and received from him one-third of the estate of Paul Tarver, deceased, to which she was entitled, under his will; that the remaining two-thirds of the estate, including the note sued on, fell to the share of Dollie Tarver; that there are some outstanding debts against said estate in execution.

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3d. An award made June 23d, 1870, on a case between H. Tarver, executor, and C. P. Heartwell, as guardian for Dollie Tarver, a minor, showing that the note sued on, and other notes of said estate in the hands of said executor, were awarded to said Dollie Tarver, and fully ratifying the settlement made in 1863.

Plaintiff closed. Defendants moved to dismiss the case, on the ground that there had been no proof of the payment of taxes on the note sued on. The motion was sustained by the Court and the case dismissed.

Plaintiff excepted and assigns said ruling as error.

VASON & DAVIS; R. F. LYON, for plaintiff in error.

WRIGHT & WARREN, for defendant.

McCAY, Judge.

The 14th section of the Act of October 13th, 1870, expressly excepts from its operation debts due to minors. The proof in this case was conclusive that this note was the property of Dollie Tarver, a minor, and that it had been hers before the Act of October, 1870, was passed. It can make no difference how she obtained it, or whether the former owner it had complied with the law. If the debt be due to a minor, the affidavit is not required. That there are still debts due by the estate from which the note came to her cannot change the fact that the note is hers, and is due to her. Creditors of the debts may have a right to sue the executor for a devastavit, and, perhaps, to go on the distributees or executors for their debts, but the title to the note passed to her, and it was, by the final decree, declared to be hers, and, as it was in the hands of her testamentary guardian, her title to it was complete.

Judgment reversed.

1872

1872

Smith vs. Turnley.

JOHN D. SMITH, plaintiff in error, vs. P. L. TURNLEY, administrator, defendant in error.

The conditional affirmance of the judgment of the Superior Court by this Court, which requires the defendant in error, who was plaintiff below, to write off a portion of the verdict, the whole amount of which was in controversy, does not entitle the plaintiff in error to enter judgment in the Court below for the costs incurred in the Superior Court when the defendant in error complies with the condition.

Costs in Supreme Court. Before Judge PARROTT. Floyd Superior Court. January Term, 1872.

John D. Smith moved to enter up a judgment against P. L. Turnley, as administrator, for the costs in a case carried to the Supreme Court of Georgia, in which said Smith was plaintiff in error, and said Turnley as administrator, defendant in error. The judgment of the Supreme Court, which was made the judgment of the Superior Court, was as follows:

"JOHN D. SMITH, plaintiff in error, vs. P. L. TURNLEY, administrator, defendant in error.

"This case came before the Court upon a transcript of the record from the Superior Court of Floyd county, and after argument had, it is considered and adjudged by the Court that the judgment of the Court below be affirmed, with direction that the plaintiff write off from the verdict of the jury the amount in excess of the rent due by the parties for their actual occupancy of the premises, with legal interest thereon, or, in default, that a new trial be granted.

"BILL OF COSTS.—Entering case, six dollars. Recording opinion, six dollars. Remitter, two dollars. Sheriff's fee, one dollar and twenty-five cents. \$15 25."

The verdict was reduced, according to the directions of the Supreme Court. The Court overruled the motion to enter a judgment for the costs, and movant excepted, and now assigns said ruling as error.

 Arnold vs. The State of Georgia.

E. N. BROYLES, for plaintiff in error.

No appearance for defendant.

MONTGOMERY, Judge.

Incident to the judgment are the costs. This has been the law since the statute of Gloucester, (6 Edition, 1,) chapter 1, section 2. By 43 Elizabeth, chapter 6, if, in any personal action, with certain exceptions, the debt or damages to be recovered shall not amount to forty shillings, then the plaintiff may recover no more costs than damages: 2 Tidd's Pr., 945, &c. If defendant pleads and proves tender of the whole now due, he recovers costs. But if the plaintiff should succeed, on the trial, in proving a larger sum to be due than that tendered, though that sum be below forty shillings, yet the plaintiff will be entitled to costs: 3 Bl., 304, *n*. In the case at bar, no tender was made of any amount, but the whole now was controverted, and the judgment of this Court is ordered to set aside the whole verdict. The plaintiff in error failed to accomplish this, and is therefore "liable for the costs." Code, 3625. There was no "judgment of reversal," but it was "considered and adjudged that the judgment of the Court below be affirmed, with direction," etc.: Code, 3625.

Judgment affirmed.

D. ARNOLD, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

Upon the trial of the defendant for an assault and battery, it was not error in the Court to charge the jury, "that if they believed the prosecutor used insulting and abusive language to the defendant, it might or might not amount to a justification, depending upon the extent of the battery, and if they believed, from the evidence, that the defendant used the first insulting and opprobrious words, they might take that

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into consideration in determining whether the defendant was justified in making the alleged assault." (R.)

2. Newly discovered evidence which, with ordinary diligence, might have been produced on the trial, of merely a negative character, and which would not even probably have changed the result, is not a good ground of new trial. (R.)
8. The verdict of the jury was not contrary to the law and the evidence, but strictly in accordance therewith. (R.)

Criminal law. Assault and battery. New trial. Newly discovered evidence. Before Judge COLE. Houston Superior Court. December Term, 1871.

S. D. Arnold was placed upon trial on an indictment for assault and battery. The defendant pleaded not guilty. The following evidence was introduced:

John Sullivan, sworn for the State, testified, that in the Spring of 1870, he met defendant in Killen's store, in the town of Perry, in Houston county; that defendant asked witness to take a drink, and witness declined, and told defendant that he had been to consult General Warren, and meant to prosecute him for employing a negro witness had previously hired; that defendant became angry, and commenced cursing witness, called witness a G—d d—d rascal or G—d d—d son of a bitch; that defendant used obscene language generally towards witness; that witness told him he was a peaceful man, and wanted no difficulty with him; that witness then called defendant a liar or a rascal; that defendant then assaulted witness, kicking him violently and attempted to kick witness in the abdomen; that witness was sore for several days after the assault.

Dr. A. M. Peurifoy, sworn for the defendant, testified, that witness was standing near when the difficulty began, with his back turned towards the parties; that as soon as witness heard the noise of the altercation he turned, and did not see defendant strike Sullivan; that witness could have seen if any blow been struck; that witness does not remember the expressions used by either party.

Arnold *vs.* The State of Georgia.

The jury found the defendant guilty. A motion was made a new trial upon the following grounds, to-wit:

1st. Because the Court erred in charging the jury, "that they believed the prosecutor used insulting and abusive language to the defendant, it might or might not amount to justification, depending on the extent of the battery; and they believed, from the evidence, that the defendant used first insulting and opprobrious words, they might take it into consideration in determining whether the defendant was justified in making the alleged assault."

2d. Because the verdict is contrary to, and decidedly and ungly against the weight of evidence.

3d. Because of material evidence not merely cumulative in its character, but relating to new and material facts, discovered by the defendant since the trial.

4th. Because the verdict was contrary to law and evidence without evidence to support it.

In support of the 3d ground, were appended the affidavits of P. B. D. H. Culler, and Hugh L. Dennard, to the effect that they were present at the time of the alleged assault and heard no obscene or opprobrious language used by defendant; that the only language of that character which was heard, was used by the prosecutor; that they did not communicate these facts to defendant or his counsel until after the trial. Also, the affidavit of defendant to the effect that this evidence came to his knowledge since said trial. The new trial was refused, and plaintiff in error excepted to each of the grounds aforesaid, and assigns the said errors as error.

W. C. MILLER, for plaintiff in error.

W. CROCKER, Solicitor General, represented by POE,
for the State.

Beatie vs. Brown et al.

WARNER, Chief Justice.

The defendant was indicted for an assault and battery, and on the trial of the case the jury found him guilty. A motion was made for a new trial on the grounds of error in the charge of the Court, that the verdict was contrary to law and the evidence, and for newly discovered evidence. There was no error in the charge of the Court to the jury, in view of the facts as disclosed by the record. The verdict of the jury was not contrary to the law and the evidence, but strictly in accordance therewith. The newly discovered evidence is merely of a *negative* character, and would not even *probably* have changed the result. Besides, the defendant must have known who were present at the time of the difficulty, or might have known upon inquiry, and if he had used ordinary diligence, could have ascertained what they knew about the transaction before the trial. Courts do not favor applications for new trials on the ground of newly discovered evidence.

Let the judgment of the Court below be affirmed.

DAVID A. BEATIE, plaintiff in error, *vs.* W. D. BROWN, deputy sheriff, *et al.*, defendants in error.

While it is true, as a general rule, that no judicial interference can be had in any levy or distress for taxes, yet where it happens that a tax collector placed a tax *fi. fa.* in the hands of the sheriff, with instructions to collect the same out of the first money that should come into his hands from the sale of the defendant's property under an execution held by him, and the sheriff did sell property of the defendant for more than enough to pay off the tax *fi. fa.*, under other conditions, and application was made to the tax collector for his share to have this money paid over to such executions, which he refused, the sheriff thereupon took the responsibility of paying over the money to the levying executions and then of his own motion levied the tax *fi. fa.* upon other property of the defendant without instructions to that effect from the tax collector, the sheriff will be enjoined from proceeding

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under the tax *fi. fa.* at the instance of a creditor of the defendant, who has attached the property last levied on, who states in his bill that the defendant is insolvent, and that if complainant is deprived of this means of securing this debt by the action of the sheriff, he will lose it, it being apparent that the sheriff levied the tax *fi. fa.* for his own protection and not for the benefit of the State.

Notice given to one deputy sheriff by the tax collector, under the circumstances set forth, to satisfy the tax *fi. fa.* with the money first made, a notice to all.

Judicial interference. Tax. Notice. Injunction. Before Judge HOPKINS. Fulton county. At Chambers. May 25th, 72.

David A. Batie filed his bill against James O. Harris, sheriff, and A. M. Perkerson and W. D. Brown, deputy sheriff, praying that the sale of certain property levied on under an execution in the hands of the defendant Brown, be enjoined. The bill and affidavits read on the hearing of the application for injunction made the following case:

Hannibal I. Kimball absconded from the State of Georgia, in the fall of 1871, owing to complainant \$3,718 75, and has since remained absent from said State in a hopelessly insolvent condition. At the time Kimball left he owned a large amount of property in the city of Atlanta, including the hotel known as the "H. I. Kimball House." On November 13th, 71, complainant sued out an attachment upon the debt due to him, which was levied upon certain personal property belonging to said Kimball. Kimball had not paid his State and county taxes for the year 1871, amounting to \$6,000 or \$7,000, and being chiefly the taxes due upon the H. I. Kimball House, which was assessed as of the value of \$650,000. In January, 1872, the tax collector issued an execution which was immediately placed in the hands of deputy sheriff W. D. Brown, with instructions to collect the taxes from the first proceeds received from the sale of Kimball's property. On the first Tuesday in February thereafter, A. M. Perkerson, deputy sheriff, sold the H. I. Kimball House under a writ of execution. The proceeds were claimed to be mechanics' liens of Healey, Berry

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& Co. *et al.*, to Dr. Joseph Thompson, B. H. Hill and George Adair, for the sum of \$15,010. Brown notified Perkerson before and at the sale, that the said execution was in his hands for collection, and that the money when received must first be applied to its satisfaction. Before the money was paid out Mr. Hill went to Perkerson and subsequently to the tax collector, and proposed that if Perkerson would pay out the money in discharge of the mechanics' liens first, that he would point out other property upon which no creditor had a lien, from the sale of which the taxes could be made. The tax collector refused to make any such arrangement, as he stated he expected the taxes to be paid from the money already in hand, but Mr. Hill, by indemnifying Perkerson, or by some other means, induced him to appropriate the money to the satisfaction of the mechanics' liens, and at once caused the tax execution to be levied upon the same property upon which complainant's attachment had been previously levied. If the proceeds of this property is applied to the satisfaction of the tax execution, complainant will lose his debt. The bill prayed that the sale under said levy be enjoined, and that said tax execution be entered satisfied.

The Chancellor refused the injunction and complainant excepted, and assigns said ruling as error.

L. E. BLECKLEY; C. F. AKERS, for plaintiff in error. Tax *fi. fa.* has prior lien: Code, sec. 812. Healey, Berry & Co. *et al.*, were not mechanics: *Footman vs. Pusey, Jones & Co.* decided January Term 1872; Code, sec. 1970.

No appearance for defendants.

MONTGOMERY, Judge.

1. This case may be disposed of by the single remark that section 3618 of the Code was intended for the purpose of preventing obstacles in the shape of suits from being interposed between the State and the collection of her revenues, and of being used by parties who may have collected the same

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me under the direction of the tax collector, to shield themselves from liability incurred by them by a misappropriation of the fund collected.

2. The notice given by the tax collector to one deputy sheriff to satisfy the tax *fi. fa.* out of the first money made, was notice to all.

Judgment reversed.

ANGUS FERGUSON, plaintiff in error, vs. THE NEW MANCHESTER MANUFACTURING COMPANY, defendant in error.

Here an affidavit of taxes paid, as is required by the Act of October 13, 1870, was filed within the time prescribed, but the affidavit failed to say that "the plaintiff expected to prove the same on the trial:"
 Id, That the affidavit is amendable at the trial.

Relief Act of 1870. Tax affidavit. Amendment. Before Judge WRIGHT. Douglass Superior Court. April Term, 72.

Angus Ferguson brought assumpsit to the October Term, 71, of Douglass Superior Court, against the New Manchester Manufacturing Company on several notes made before the 1st, 1865. When said cause was called for trial, counsel for defendant moved to dismiss the same, on the ground that the affidavit as to the payment of the taxes, filed by plaintiff, did not state that he expected to prove on the trial that the taxes on the claims, which were the foundation of the action, had been duly given in and paid, as required by the Act. Plaintiff proposed to amend said affidavit to meet the objection made by the defendant. The Court held said affidavit to be fatally defective, and that the same could not be amended, and directed that the suit be dismissed. Whereupon plaintiff excepted, and assigns said ruling as error.

For defendant, MYNATT & COLLIER; POPE & BROWN, for plaintiff in error, submitted the following brief: 1. An affi-

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davit as to payment of taxes is pleading; all pleadings are amendable: Code, sec. 3429. 2. There was no plea or demurrer made in the Court below, on the ground that the demand was barred by the statute of limitations. This Court will not now consider objections on that ground: 6 Ga. R., 207; 9 *Ibid.*, 9; 16 *Ibid.*, 49; 18 *Ibid.*, 534; Const., Art. V., sec. 2., part 2.

WILLIAM EZZARD, for defendant.

McCAY, Judge.

We think this affidavit amendable. The substance of the Act is complied with in the original affidavit. It is mere matter of form that is proposed to be supplied. The affidavit is not here the foundation of the proceeding, in the sense of section 3453 of the Code.

Judgment reversed.

MARCELLUS L. PRITCHETT, administrator, plaintiff in error,
vs. THE INFERIOR COURT OF BARTOW COUNTY, defendant in error.

The declaration of a plaintiff who sues on a written contract must set forth a complete and valid contract, even when suit is brought under Jones' form of pleading. Therefore, in a suit against a county on a bond given, after the adoption of the Code, by the Justices of the Inferior Court, the pleadings must show, affirmatively, that the contract was entered upon the minutes of the Inferior Court. Without such entry, the contract would not be valid, under section 527 of the Code, if good in other respects.

Contract with Inferior Court. Minutes. Pleading. Before Judge HARVEY. Bartow Superior Court. March Term 1872.

Marcellus L. Pritchett, as administrator *de bonis* mortis of Bennett H. Conyers, deceased, brought complaint against

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erior Court of Bartow county, alleging the following facts, wit: That defendant is indebted to petitioner in the sum \$9,765, besides interest, on a bond dated October 27th, 1863, and due January 1st, 1864, with interest from the date said bond, which said defendant refuses to pay.

To the declaration was attached the following copy bond :

“MANASSAS, GEORGIA, October 27th, 1863.

TATE OF GEORGIA—BARTOW COUNTY :

‘Be it known, that the county of Bartow owes to Bennett Conyers or bearer the sum of nine thousand seven hundred and sixty-five dollars, for the amount paid by him this day into the treasury of said county, for the support of soldiers’ families, in accordance with the provisions of an order made by the Inferior Court of said county on the 6th day of February, 1863, which sum of money the said county of Bartow promises to pay the said Bennett H. Conyers or bearer on or before the 1st day of January, 1864, with interest at the rate of seven per cent. per annum, from this day. This bond shall be received in payment of county taxes, or other debts due the county.

‘In witness whereof, the Clerk of the Inferior Court and County Treasurer have hereunto set their hands and attached the seal of the Inferior Court of said county. Done in order of the Inferior Court of Bartow county, this 27th day of October, 1863.

Signed) “B. F. GODFREY, Clerk Inferior Court. [L. S.]

“ARTHUR HAM, County Treasurer. [L. S.]

\$9,765.”

The defendant demurred to the declaration. The demurrer was sustained by the Court and the action dismissed. To which ruling defendant excepted, and assigns the same as error.

WARREN AKIN, for plaintiff in error.

JOHNSON, represented by LESTER & THOMSON, for defendant.

Radcliff vs. Gunby & Company.

MONTGOMERY, Judge.

This declaration is in the form prescribed by the Act of 1847, commonly called Jones' form. If plaintiff elects to sue in that form, he must, nevertheless, set forth a complete cause of action: *Phillips vs. Dodge*, 8 Georgia, 51. A bond given by the Inferior Court of Bartow county since the adoption of the Code is not valid, unless the contract is entered on the minutes of the Court: Code, 527. It nowhere appears that any entry of this contract was ever made on the minutes of the Court. It follows that no sufficient cause of action appears, and the suit was properly dismissed.

Judgment affirmed.

GEORGE W. RADCLIFF, plaintiff in error, vs. R. B. GUNBY
& COMPANY, defendants in error.

When a merchant sells an article as a fertilizer, at the market value of that particular kind or description of fertilizer, the law implies that he warrants to the purchaser thereof, that the article sold is a merchantable article, and reasonably suited to the use for which it is purchased; and if it is not, the defendant may plead it in abatement of the purchase money agreed to be paid therefor. (R.)

Sale. Warranty. Before Judge JOHNSON. Muscogee
Superior Court. November Term, 1871.

For the facts of this case, see the decision.

BLANDFORD & CRAWFORD, for plaintiff in error.

No appearance for defendants.

WARNER, Chief Justice.

The plaintiffs brought an action against the defendants
an open account for \$148 36, for "Wilson's Phosphate."

Radcliff vs. Gunby & Company.

appears from the bill of particulars annexed to the plaintiffs' declaration. On the trial of the case the plaintiffs proved that the article charged in the account was worth the price urged in the market, and that the same was sold and delivered to the defendant at that price. The defendant proved that he bought the article of the plaintiffs as a fertilizer, and that the same had no virtue in it and was of no use or value whatever; that he had judiciously used it and it had no effect on the crops. The Court charged the jury that if defendant purchased of the plaintiffs the articles mentioned in the account sued on, and the same had a market value, then the plaintiffs were entitled to recover of defendant whatever was proved to be the market value of the same, although the same was of no value or benefit to the defendant. To which charge the defendant excepted. The jury found a verdict for the plaintiffs for the full amount of the account. Whatever may have been the rule of the common law applicable to this question, we think the charge of the Court was error, according to the provisions of the 2609th section of the Code of this State. That section declares, "If there is no express warranty of warranty, the purchaser must exercise caution in detecting defects—the seller, however, in *all cases* (unless expressly, or, from the nature of the transaction, excepted,) warrants, first, that he has a valid title and right to sell; and, that the article sold is merchantable, and reasonably adapted to the use intended; third, that he knows of no latent defects undisclosed. A breach of the warranty, express or implied, does not annul the sale, if executed, but gives the purchaser a right to damages. It may be pleaded in abatement of the purchase money." Code, section 2610. In this case, the defendant pleaded the general issue only—the breach of the warranty implied by law was not specially pleaded in abatement of the purchase money, but the evidence going to show a breach of the warranty, implied by law, was admitted without objection, so far as the record shows; that evidence proves that the article, Wilson's Phosphate, was purchased of the plaintiffs by the defendant as a

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fertilizer, and that it was worthless for that purpose. When a merchant sells an article as a fertilizer, at the market value of that particular kind or description of fertilizer, the law implies that he warrants to the purchaser thereof that the article sold is a merchantable article and reasonably suited to the use for which it is purchased; and if it is not, the defendant may plead it in abatement of the purchase money agreed to be paid therefor.

Let the judgment of the Court below be reversed.

BUTLER, MCCARTY & COMPANY, plaintiffs in error, vs.
JOHN M. CLARK & COMPANY, defendants in error.

The monthly wages of a clerk, subject to a *pro rata* deduction for time lost, cannot be garnished in the hands of his employer.

Garnishment. Wages. Before Judge GOULD. City Court of Augusta. February Term, 1872.

Butler, McCarty and Company obtained judgment against William J. Freeman and Henry N. Freeman, partners, under the firm name of Freeman Brothers, for \$997 37, principal, besides interest, at the August Term, 1871, of the City Court of Augusta. Garnishment process was subsequently issued out on said judgment, and John M. Clark & Company were served as garnishees on December 18th, 1871. On February 28th, 1872, the garnishees filed an answer admitting an indebtedness to Henry N. Freeman of \$220 for daily wages of a clerk, but claimed the same to be exempt from garnishment. The answer was traversed and the issue thereon submitted to a jury.

It appeared, from the evidence, that Henry N. Freeman was employed by the firm of John M. Clark & Company in their mill as receiving and shipping clerk, and performed all other duties required of him by the firm; that when he was served as garnishees the firm was paying him at the rate of

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per month, but has been, since Christmas, paying him the rate of \$75 per month; that the firm has the privilege of discharging him at any time, and of deducting from the amount payable, at the rate per month, for any lost time; that the amount named in the answer is now due him; that he is allowed to draw his money whenever he wants it, as no fixed time of payment has been agreed on.

The jury returned a verdict for the garnishees. Plaintiffs moved for a new trial upon the following ground, to-wit:

That because the Court charged the jury "that if they found that defendant, Henry N. Freeman, was paid by the firm his wages as clerk were exempt from garnishment in the hands of the garnishees. That the statute exempting wages of journeymen mechanics and day laborers was to be liberally construed, and he saw no reason why a clerk's wages, if paid by the day, should not be exempted. That it was for the jury to determine, from the evidence, whether the defendant was employed by the day or at a stated salary per month, and that a sum certain per month, subject to deduction for lost days, might be considered by them as daily wages."

The motion for a new trial was overruled, and plaintiffs excepted and assigns said ruling as error.

RANK H. MILLER, for plaintiffs in error. 1. Clerks are journeymen mechanics or day laborers: 25 Ga., 576. 2. Masters have been decided to be entitled to the benefits of exemption: 25 Ga., 571. But they are ruled not to be entitled to a lien under the Act of 1869, unless they pay with their own hands: *Rust, Johnson Co. vs. Billings*, decided July 18, 1871; *Footman vs. Pusey, Jones & Co.*, decided April 23, 1872.

CLAY FOSTER, for defendant. The charge was right in the law: 25 Ga. R., 571.

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MONTGOMERY, Judge.

Does the evidence in this case show that Henry N. Freeman was a "journeyman?" He was shipping and receiving clerk for the garnishees, "and performed any other duties required of him by the firm." They paid him at the rate of so much per month; could discharge him at any time, and deducted for lost time at the rate at which they paid him. A journeyman is defined to be a day laborer, a hired workman: Zell's Encyclopedia. If Freeman was not a day laborer he was certainly a hired workman. And the state evidently does not confine the meaning of the word to day laborer. It says "all journeymen, etc., shall be exempt from the process and liabilities of garnishment on their daily, weekly or monthly wages," etc.: Code, 3496. The construction of the garnishment laws in favor of persons whose daily support, and that of their families, depend upon their earnings, should be liberal: 25 Georgia, 571. If an overseer's wages, which are usually paid, (in great part, at least,) yearly, are not subject to garnishment, it would seem to follow, *a fortiori*, that a clerk's wages, payable monthly, are not, still less the wages of one payable at even shorter intervals of time. They come literally within the very words of the exempting statute. One may not be a laborer or mechanic within the meaning of those terms as used in the Constitution, and yet be entitled to have his earnings exempted from garnishment. The words of the Constitution were evidently intended to apply to *manual* laborers and mechanics, whose claims are usually small, and, owing to the necessities of the laborer, promptly enforced. Otherwise, a host of unrecorded and secret liens for large amounts would fasten themselves upon much of the property in the State. Such parasites would tend to the destruction of the value of property preventing its easy alienation.

Quære—Can an individual debt, due to one partner, be garnished to pay a debt due by the partnership?

Judgment affirmed.

STEPHEN SHELL *et al.*, executors, plaintiffs in error, *vs.*
EUGENIA A. SANDERS *et al.*, defendants in error.

Where a bill was filed by the legatees of an estate against the executors, praying an account and settlement, and the jury find in favor of two of the complainants only, directing certain specific assets on hand to be turned over to them saying nothing about the other complainants: *Id.*, That, as in equity, the jury may find a special verdict, this verdict is not void, as not disposing of the issues.

The Chancellor may, in the final decree, dispose of the whole case in accord with the verdict, and it is, therefore, sufficient.

Where, on the trial of a bill for account and settlement in favor of the legatees of an estate against the executors, the jury found that one of the executors was not liable to the legatees at all, and the verdict directed certain notes and assets to be turned over by the other executor to the legatees, and two of these notes were the notes of the executors, made by them as memoranda of moneys belonging to the estate, used by them:

Id., That the verdict was illegal. The jury should have found against the executors a money verdict for the amount of the notes, and it was right in the Court to grant a new trial.

Special verdict. Practice. New trial. Before Judge
BRENE. Newton Superior Court. March Term, 1871.

Eugenia A. Sanders and others, legatees under the will of Charles H. Sanders, deceased, filed their bill for account and settlement against Stephen Shell and Nathan Turner, executors of said will. Charles H. Sanders died in August, 1851, leaving an estate of the value of about \$100,000. The bill contained charges of mismanagement of the estate and violations of the provisions of said will by said executors.

The defendants answered the bill, but not being material to an understanding of the decision of the Court, the answers were not set forth.

The jury returned the following verdict: "We, the jury, find that the executor, Stephen Shell, pay over to Eugenia Sanders, legatee of Charles H. Sanders, the one-half of the following assets, and that he pay over the other half of said assets to Anna and Charles Hicks, orphans of Ophelia Hicks, giving each of said orphans the one-half of one-half:

Shell et al. vs. Sanders et al.

Georgia Railroad Bank bills.....	\$540 00
Greenbacks and specie.....	4 65
3 shares of Georgia Railroad and Banking Company.	
1 one hundred dollar bill, Bank of Columbus.....	100 00
Mechanics' Bank.....	50 00
1 note on Nathan Turner.....	500 00
Notes on Stephen Shell—	
1 due July 10th, 1865.....	650 00
1 due January 12th, 1869.....	
1 note on Y. Y. Hyer, due November 30th, 1857...	18 40
Credit on the above, May 10th.....	\$5 00
1 note on J. Y. Carroll, J. H. Hyer, security, due	
December 20th, 1859.....	15 00
1 note on Mary J. Heath, L. M. Smith, security,	
due December 25th, 1859.....	25 00
1 note on E. Chapman, due April 6th, 1861.....	6 17
Mortgage on some property in Covington on Joel	
B. Mabry, on note due November 4th, 1860...	500 00
Nathan Turner not responsible as executor of C. H. San-	
ders' estate. Cost of this suit to be paid by complainants."	

The complainants moved for a new trial upon the following, among other grounds, to-wit :

Because said verdict does not cover the issues made by the pleadings, and is illegal.

The motion for a new trial was sustained by the Court and defendants excepted and now assign said ruling as error.

CLARK & PACE, for plaintiffs in error.

JOHN J. FLOYD, for defendants.

McCAY, Judge.

Were this a case at law there would be some difficulty in sustaining the verdict, on the ground that it does not dispose of the issues made by the record. But in equity the Court may find a special verdict, and the Judge enters his decision giving form and consistency to the finding of the jury.

 Dubose vs. McDonald.

y evidently it was the intent of this jury to find that
 ing was due the other plaintiffs, and that the executor,
 inst whom they failed to find, was not liable. The Court,
 endering a decree, may dispose of the whole case on this
 ing, making the record complete by adjudging, as the
 nt of the verdict evidently is.

but this verdict ought not to stand, for another reason.
 : jury had no right to order the defendants' notes to be
 ed over to the plaintiffs. The complainants come into
 rt asking an account and decree for what is due. If the
 utors have used the money of the estate and put their
 : notes in its place, they are liable for the money. It is
 d's play to say to a suitor in equity, "The defendant
 used this money which he held in trust, and he has put
 ng the papers his note for the amount. You shall have
 note; you may sue him upon that." As we have said,
 complainants are entitled to a judgment for the money or
 ing, as to these notes. The jury seem to have been of
 ion, from the evidence, that these notes represented
 ey belonging to the estate, used by the defendants. They
 ht, if they so thought, have found a money verdict for
 amount due. And for the same reason there ought to
 e been a verdict against the other executor.

We have not gone into the calculations to see if there is or
 ot anything due. As there is to be a new trial, we think
 unnecessary. We affirm the judgment because if the
 m of the two executors are the property of the estate,
 executors are liable to a money verdict for their amount.
 ndgment affirmed.

THE DUBOSE, by her next friend, plaintiff in error, vs.
 EDWARD McDONALD, defendant in error.

a wife, with consent of her husband, rents land on her own ac-
 , hires a man to cultivate it, and furnishes and feeds a horse, out
 her separate estate, to be used in making the crop, the crop, when

Dubose vs. McDonald.

made, is not subject to a factor's lien given by her husband on his crop, made the same year, for provisions furnished, especially when the evidence shows that none of the provisions furnished were used by the wife in making her crop.

Factor's lien. Husband and wife. Separate estate. Before Judge HARRELL. Randolph county. At Chambers. February 9th, 1872.

Edward McDonald levied an execution, based on a factor's lien, on two bales of cotton as the property of Sidney Dubose. Sarah Dubose, by her next friend, filed a claim to said cotton, which was tried before the Justice Court for the Seven Hundred and Eighteenth District, Georgia Militia, and said property found subject. The claimant presented her petition for the writ of *certiorari* to Judge Harrell, which set forth substantially the following facts as appearing from the evidence in said cause: That Sidney Dubose, the husband of claimant, purchased from McDonald provisions, bagging and ties, to assist him in making his crop for the year 1870, and gave her him a factor's lien upon said crop; that the cotton levied on was not put up in said bagging; that Sidney Dubose farmed separate from his wife, and had no interest whatever in her farm; that he did not furnish her with supplies of any kind; that he borrowed some corn from his wife which he returned from corn purchased from McDonald; that Sarah Dubose rented the land she farmed on, and furnished her own provisions; that the cotton levied on is the cotton made by said Sarah Dubose; that McDonald sold no supplies of any kind to Sarah Dubose.

The writ of *certiorari* was refused, and plaintiff in error excepted.

WORRILL & CHASTAINE, for plaintiff in error.

HOOD & KIDDOO, for defendant.

MONTGOMERY, Judge.

Since the Act of 1866 and the Constitution of 1868, section article 7, married women who have no trustee stand very much upon the same footing as *femes sole*, except as to contracts suretyship, etc., as to their separate property: *Huff vs. Light*, 39 Ga., 41. The evidence in this case shows that the wife had separate property; that she hired the farm on which the cotton levied on was made, with her husband's assent; that out of her separate estate she furnished and fed a mule to work the farm; that none of the provisions furnished to her husband by the plaintiff in *fi. fa.* were used in raising her crop, except in so far as her husband lent out of them some corn he had borrowed from her; that the husband had nothing to do with her farm. We think, therefore, under the foregoing facts, the factor had no more right to levy his lien execution on her crop than he had to levy it on the crop of any stranger. The judgment be reversed.

M. SIMMONS, plaintiff in error, vs. GEORGE A. GUISE, defendant in error.

The defendant signed a note, given by a member of a firm individually, for money borrowed for the use of the firm, as security, and in a settlement of the partnership affairs, that note was settled by acceptance by the plaintiff of a note made by said partner, without his assent, and the defendant was not present, assenting thereto, that he discharge him from his liability as security. (R.)

Principal and security. Novation. Partnership. Before J. HARRELL. Terrell Superior Court. November Adm. Term, 1871.

George A. Guise brought complaint on the following note, which was lost:

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Simmons vs. Guise.

"\$200. Sixty days after date, we or either of us promise to pay John A. Hiers or bearer two hundred dollars, for value received, with interest at two and a half per cent. per month. This February 1st, 1869.

(Signed)

"JACOB SIX,
"JAMES M. SIMMONS,
"R. T. HARPER."

Proceedings were instituted simultaneously to establish a copy of the same. By agreement, both issues were tried together.

James M. Simmons pleaded to the suit, the general issue, and *non est factum* as to the note sued on, with the following qualification, "that he did, in the spring of 1869, about the first day of May, sign a certain note for the sum of \$200, payable to J. A. Hiers or bearer, as security for Jacob Six, which note was for borrowed money for the business of the firm of Six & Guise, of which firm plaintiff was a member and which note was afterwards paid off and fully satisfied by plaintiff, as the surviving partner of said Six & Guise. Defendant further says, that said plaintiff, as a member of the firm of Six & Guise, received the benefit of said borrowed money, for which said note was given, and recognizing his liability for the payment of the said note, went forward and paid off the same, as well as house rent and other debts, and took possession of all the stock of said Six & Guise, and disposed of the same to a great advantage. Defendant further says, that plaintiff and said Jacob Six, partners aforesaid, had a full settlement of their partnership, in which settlement this note was taken into consideration and settled between said parties, to-wit: plaintiff and defendant Six, and, in said settlement, said plaintiff thereby acknowledged his equal liability with said Six for the payment of said note."

The defendant, R. T. Harper pleaded the general issue, and *non est factum*.

It appeared from the evidence that G. A. Guise had

Simmons vs. Guise.

note sued on from J. A. Hiers, paying therefor \$207, including interest, at two and a half per cent. per month; that the note was lost; that it was signed by Jacob Six, principal, and J. M. Simmons and R. T. Harper, securities, as Hiers told plaintiff; that plaintiff had a settlement with Jacob Six as to all their partnership business, in which the note sued on was settled; that plaintiff took the note of Jacob Six for \$200, with the understanding that said Hiers' note should stand as paid, if Six paid his note; that plaintiff received on the Six note \$65, and entered a credit for the same; that plaintiff still held said Six's note for the balance due on the same; that Hiers had frequently dunned plaintiff on the note sued on before he paid it; that R. T. Harper never signed said note, nor authorized any other person to sign the same for him; that the money obtained on the note sued on was all used for the partnership business of Six & Guise; that plaintiff told defendant Simmons that he had paid off said note and had lost it.

The evidence was conflicting as to whether the Six note for \$200 was given specifically in lieu of the note sued on, or for a general balance on a settlement of all the partnership matters of Six & Guise, including said note; also, as to whether the satisfaction of the note sued on was made dependent upon the payment of the Six note.

The jury returned a verdict against James M. Simmons, security, for \$200. The defendant Simmons moved for a new trial, upon the following grounds, to-wit:

- 1st. Because the verdict is contrary to evidence and against the weight of evidence.
- 2d. Because the verdict is contrary to the charge of the Court and contrary to law.
- 3d. Because the Court erred in charging the jury, "that they had nothing to do with the partnership of Six & Guise, unless they believed from the evidence that the name of Guise was to the note," and in ruling out the evidence as to the partnership of Six & Guise.
- 4th. Because the Court erred in ruling out the evidence

Simmons vs. Guise.

offered by defendant to prove that plaintiff paid other claims against Six, and that plaintiff got the whole proceeds of the sale of the stock of goods of Six & Guise, and was more than fully reimbursed for all losses.

5th. Because the Court erred in charging the jury, "that if defendants, by themselves or attorney, were present and assisted in the settlement between Six & Guise, then defendants were bound by the terms of the settlement," when it was in evidence that R. F. Simmons, Esq., was present, acting as the attorney of Guise, not of defendants.

The sheriff returned *non est inventus* as to Jacob Six, and he was consequently not a party to the case.

The Court directed a new trial, unless plaintiff would remit the sum of \$65, paid on the Six note.

To which ruling plaintiff in error excepted, and assigns error upon each of the grounds aforesaid.

R. F. SIMMONS; C. B. WOOTEN; L. C. HOYLE, for plaintiff in error.

F. M. HARPER; CLARK & GOSS, for defendant.

WARNER, Chief Justice.

This was an action brought by the plaintiff against the defendants on a promissory note for the sum of \$200, payable to Hiers or bearer sixty days after date. On the trial the jury found a verdict against J. M. Simmons for \$200. A motion was made for a new trial on the grounds specified in the record, which was granted by the Court, unless the plaintiff should remit on the record the sum of \$65 to plaintiff on the Six note, and if he does so the new trial shall be denied. Whereupon the defendant excepted. From the facts disclosed in this confused record, as we understand them, a new trial should have been granted absolutely. The defendant, Simmons, signed the Hiers' note as security. If that note constituted a part of the partnership liability of Guise & Simmons upon a settlement of their partnership affairs, that note

Carr et al. vs. Houser.

settled by the taking of Six's note by the plaintiff, and if J. M. Simmons, the security, was not present, assenting thereto, that would discharge him from the payment of the Hiers' note to the plaintiff. There is evidence in the record which looks that way. In our judgment, there should be a new trial in the case, and that question submitted to the jury under the charge of the Court.

Let the judgment of the Court below be reversed.

V. L. CARR, executor, *et al.*, plaintiffs in error, *vs.* D. H. HOUSER, administrator, defendant in error.

purchase by a Receiver, as agent of another, of property sold at his own sale, made under order of Court, is voidable at the election of a party having a beneficial interest in the property, and when such election is promptly made, the sale will be set aside.

Receiver's sale. Purchase by Receiver. Before Judge COLE. Houston county. At Chambers. January 4th, 1872.

David H. Houser, on behalf of himself and other creditors of Carr & Jones, and as administrator of Edward W. Jones, one of the members of said firm, and W. L. Carr, as executor of the last will and testament of Joseph N. Carr, another member of said firm, filed their bill against the attorney-at-law of said Jones and the legatees of said Carr, in which the appointment of a Receiver was prayed to take possession of the partnership property of said late firm of Carr and Jones and to sell the same. On October 24th, 1870, Judge Cole appointed the complainant, David H. Houser, Receiver, upon his giving bond and security in the sum of \$10,000, and directed him to take possession of the real and personalty of said late firm and to sell the same, by thirty days' advertisement, at the Court-house in Perry, Houston county, at public outcry, to the highest bidder.

Carr et al. vs. Houser.

The Receiver reported to the January Term, 1871, of Houston Superior Court that he had sold a part of the realty belonging to said Carr & Jones on the first Tuesday in January, 1871, when the same was bid off by John A. Houser for the sum of \$2,100.

W. L. Carr, as executor as aforesaid, and as a legatee under the will of Joseph N. Carr, deceased, and Holland Carr, also a legatee under said will, objected to the report of said Receiver upon the following among other grounds:

1st. Because he, the said David H. Houser, proceeded to have the said lands and mills sold for one-half cash and the other on time, and bid them off himself by his own bid, and for himself, as it is believed, and which was so publicly announced at the time by the crier, at the pitiful sum of \$2,100, when the property was worth at the time \$8,000 or \$10,000, and which said Houser well knew; and, therefore, they say that said pretended, fraudulent sale should be set aside for the gross inadequacy of the price for which said lands and mills sold; that, indeed, there has been no legal sale by the said Houser, Receiver, to himself, and that the title to the property sold is not at all changed by said pretended sale.

2d. Because the said John H. Houser did not purchase said land and mills, and if his brother, the said David H. Houser bid them off for the said John H. Houser, which is denied by these objectors, it was all done with full notice by both of said Housers of the before-mentioned facts, and the gross inadequacy of the price should forbid the recognition of said sale as valid by any Court.

The Receiver made a separate report as to the sale of a certain other tract of land belonging to said late firm of Carr & Jones, to which substantially the same objections were filed.

On the 4th day of January, 1872, at Chambers, Judge Cole passed an order confirming said sales, it having been agreed between the parties that said objections should be heard in vacation. Whereupon plaintiffs in error excepted to said order, and now assigns the same as error.

WARREN & GRICE, for plaintiffs in error.

DUNCAN & MILLER, for defendant.

MONTGOMERY, Judge.

The Receiver who bid the property off at his own sale insists he did so as agent of his brother, and not for himself, and therefore contends the sale is valid. Unless there is a distinction in this respect between a Receiver's and a sheriff's sale (which is not perceived) the question is not an open one. Indeed, the Court has gone so far as to declare such a sale absolutely void. It is sufficient for the purposes of this case to say that such a sale is clearly voidable at the election of a party having a beneficial interest in the property, and when such election is promptly made, as was done in this case, the sale will be set aside.

In *Harrison vs. McHenry*, 9 *Georgia*, 164, this Court held that a sheriff cannot purchase at his own sale, either for himself or as agent of another, but such purchase is void. The reasons given for the decision there apply with full force here. The sale should have been set aside.

Judgment reversed.

WILSON D. NICHOLS, plaintiff in error, *vs.* F. M. CHANDLER *et al.*, defendants in error.

An intruder's warrant does not lie against one who, in good faith, claims the right to the possession of the premises he is sought to be ejected from, and if the defendant in such a warrant makes the counter-affidavit required by the Code, and it appears on the trial that he does, in good faith, claim the right to the possession, the jury ought to find for the defendant.

Intruder's warrant. Before Judge GREENE. Rockdale Superior Court. September Adjourned Term, 1871.

Nichols vs. Chandler *et al.*

Martha Kilpatrick, from whom both parties in this case claim to have derived title, had four children. On the 17th of May, 1859, she made and executed an instrument, whether deed or will has not yet been determined, conveying to two of her children, Margaret J. and Amanda M., jointly, the whole of her estate, consisting of one hundred and ten acres of land and some personalty. The preponderance of evidence is that this instrument, after execution, was left in the hands of Esquire Born to be delivered after the death of the maker. Margaret J., one of the beneficiaries under the above described instrument and her brother, died before their mother. Amanda M., the other beneficiary, and wife of one Kirk, and Mary A., wife of H. R. Nichols, were the only surviving children of the maker of said instrument; they, with their husbands, remained in possession of said land from the death of their mother. On August 28th, 1869, Henry R. Nichols and his wife Mary A. conveyed by deed their undivided interest in the land to the defendant, Wilson D. Nichols. On November 7th, 1870, Brazell Bradford was appointed administrator on the estate of Margaret J. Kilpatrick, and on August 2d, 1871, sold the land in dispute, to-wit: an undivided half interest to F. M. Chandler. F. M. Chandler and Brazell Bradford sued out a warrant against Wilson D. Nichols as an intruder, when the facts as above set forth appeared in evidence.

Defendant requested the Court to charge the jury as follows, to-wit: "That if they believed, from the evidence, that defendant claimed a *bona fide* and legal title to the land when he entered on the possession, forcible entry and detainer was the proper remedy." The Court refused to charge as requested, and defendant excepted.

The jury returned a verdict for the plaintiffs, and defendant moved for a new trial upon the following, among other grounds, to-wit:

Because the Court failed to charge the jury as requested. The motion for a new trial was overruled, and plaintiff's error excepted, and assigus said ruling as error.

A. C. McCALLA ; JAMES A. KING, represented by NEWMAN & HARRISON, for plaintiff in error. Cited Code, sec. 4000; 21 Ga. R., 368 ; 39 Ga. R., 187, to the effect that as the defendant, in good faith, claims a legal right to the possession of the land in dispute, he cannot be ejected as an intruder.

CLARK & PACE, for defendants.

McCAY, Judge.

This Court has, in 20 *Georgia*, 228, and in 39 *Georgia*, 197, decided that in proceedings under this statute, the *bona fide* of the defendant's possession is the sole issue. If he, in good faith, claims a right to the possession, the plaintiff is given to his remedies existing before the passage of the Act. It is not enough that the defendant's claim will not stand the test of a legal investigation, as compared with the claim of the plaintiff. If his claim is a real, honest, *bona fide* claim, not a sham, but founded on some reasonable data, he is no intruder, no mere squatter, and is not to be ousted by the sheriff without any trial.

This case seems to have been tried on the idea that if the defendant's claim was not one that would support a defense in an action of ejectment by the plaintiff, that the verdict ought to be for the plaintiff. We do not undertake to say that the jury was bound, under the evidence, to have found that this claim was or was not *bona fide*. We think, however, they might have done so under the evidence. There is much going to show that these parties thought they had a good title—that they were, in good faith, claiming a right to this possession. If this was the truth they were not intruders. The construction of this paper—though, in our judgment, it conveys the title as contended for by the plaintiff below—is not yet so clear as to make those who have resisted that view of it necessarily intruders. We think that if the jury had been properly instructed as to the law,

Worrill *et al.* vs. Gill.

as we have decided it, to-wit: that if the defendant *bona fide* claims the right of possession—not fraudulently, not without any show of right, but honestly, he is not an intruder—they might have found for the defendant.

Judgment reversed.

E. H. WORRILL, administrator, *et al.*, plaintiffs in error, vs.
JACKSON GILL, administrator, defendant in error.

Where a testator, in 1854, made his will, by which he left certain land to his son, whom he appointed executor, and in 1856 conveyed the land to his son by deed, reserving a life estate to himself, and delivered the deed to his son, the legacy is adeemed. If, on the death of the testator in March, 1864, the son takes immediate possession of the land, claiming it under the deed, and in January, 1865, prove the will and qualify as executor, but does not return the land as part of his father's estate, he is not estopped by the probate and his qualification as executor, without more, from setting up his title under the deed adverse to the will.

Estoppel. Legacy. Ademption. Before Judge JONES. Marion Superior Court. April Term, 1872.

Jackson Gill, as administrator *de bonis non*, with the will annexed, of James Perryman, deceased, brought ejectment against E. H. Worrill, as administrator upon the estate of Anthony G. Perryman, deceased, *et al.*, for a certain tract of land situated in the county of Marion.

The decision of the Supreme Court will be fully understood from the refusal to charge and the charge as given.

The defendants requested the Court to charge as follows to-wit:

"If the jury shall find that James Perryman, in 1854, executed the will in evidence and devised the property in dispute to A. G. Perryman, and afterward in September, 1856, by deed conveyed the same property to said A. G. Perryman, reserving a life-estate therein to himself,

Worrill *et al.* vs. Gill.

such legacy is adeemed under section 2427 of Irwin's Code, and the fact that said A. G. Perryman may afterward have revoked the will and taken letters testamentary under it, and have sworn to execute the same according to law, did not destroy such ademption, and defendants are not thereby stopped from setting up title under said deed."

The Court refused to give the foregoing request in charge, but charged the jury to the contrary, as follows, to-wit:

"It is asserted by plaintiff that James Perryman, at the time of his death, was the owner of and had title to the premises in dispute. If so, the plaintiff is entitled to recover in this action. It is also asserted by plaintiff that James Perryman in 1854 made and published his last will and testament, disposing of this property now in controversy; that James Perryman died in 1864 in possession of the property, leaving said will unrevoked; that A. G. Perryman, one of the executors of said will, presented the same to the Ordinary for probate in January, 1865; that the same was admitted to probate as the will of James Perryman; that A. G. Perryman qualified as executor, assumed the burden of executing the same, and acted as such executor. It is, however, asserted by defendants that James Perryman conveyed his property, by deed, in 1856 to A. G. Perryman, the executor, and that the administrator of A. G. Perryman, who is the real defendant, is, therefore, entitled to retain possession of it.

"The jury will determine all these questions of fact, and if they, from the testimony, shall find the facts as asserted, then A. G. Perryman, in law, is estopped from denying the title to the plaintiff, notwithstanding the deed from James Perryman to A. G. Perryman, made in 1856, and plaintiff will be entitled to recover."

The jury returned a verdict for the plaintiff for the premises in dispute.

Defendants excepted to the refusal to charge, as herein set forth, and to the charge as given, and now assign the same as

Worrill *et al.* vs. Gill.

B. HILL; B. B. HINTON; E. H. WORRILL, for plaintiffs
in error.

M. H. BLANDFORD, for defendant.

MONTGOMERY, Judge.

The subject matter of the present suit having been specifically devised by the testator, and afterwards disposed of by him by deed, there can be no doubt that the devise was adeemed: *White vs. Winchester*, 6 Pick., 47, and authorities there cited; Code, 2427. Was the executor estopped by probate of the will from setting up the ademption? Had the testator sold the property to a stranger, and he, before probate of the will by the executor, resold to the latter, it will hardly be contended that the executor, under such circumstances, would have been estopped by the probate from showing that the property had been sold by the testator in his lifetime, and that he, the executor, had afterwards purchased it from the vendee of the testator. "The probate of a will establishes the capacity of the testator, and the fact that it has been executed with the formality required by the law," and to this extent the executor may be said to be estopped from attacking it, at least, collaterally. "But upon what particular estate, real or personal, it may operate, is a question open for examination in the Courts of common law. Those claiming the personal property under the will are required to show that it belonged to the testator at the time of his decease. And those claiming real estate, devised thereby, will be holden to prove that, at the time of making the will, the testator was seized of the same, and died seized thereof without any change or alteration of title:" *Carter et al. vs. Thomas*, 4 Metcalf, 244.

An alienation by the testator of property bequeathed in a revocation of the will. It simply operates as a revocation: *Brown vs. Thornclike*, 15 Pick., 407—or amounts to a revocation: *Hawes vs. Humphrey*, 9 Pick., 361—and in such a case, the whole will must be proven. In *Hawes vs. Humphrey*

phrey, the testator devised lands to trustees for certain purposes. He afterwards conveyed away the lands so devised. The will was attacked as revoked, so far as the clauses conveying these lands were concerned, by the alienation. The Court says, "it is contended that the devise to the trustees is void, on various grounds. But this question is not examinable by us, sitting as a Supreme Court of Probate. The construction of the will, and the validity and effect of its various provisions, are to be determined by a Court of common law jurisdiction. The probate of a will does not affect the validity or invalidity of any particular clause in the will, [as to the property on which it operates is evidently intended.] This is not the case, therefore, in which a limited probate is necessary, the proof being sufficient to establish the will, as respects the real as well as the personal estate." Indeed, to hold that alienation of property devised was, technically, a revocation, would be to permit a revocation by means other than those set forth in the 6th section of the statute of frauds, substantially adopted by our Code, sections 2435, 2436. By keeping in mind that the question before the Ordinary, when a will is propounded for probate, is not what property passes by this paper, but whether the testator has executed it with the formalities required by law, we will perceive what the judgment of probate is, to-wit: that the propounded paper has been duly executed, and it is adjudged that it be admitted to probate, leaving to the Courts of common law to decide what property passes under it.

If, then, I am correct in supposing that an alienation of bequeathed property by the testator is not strictly a revocation, but only operates as such, leaving the will still to be proved in its totality, and that the judgment of probate does not decide what passes under the will, the executor, when setting up adverse title to the property conveyed by the will, which adverse title is based upon an ademption of the legacy, is not denying the will he has proved, and, therefore, is not toppled by the judgment of probate. To hold otherwise would be to deprive an executor of his right to qualify, if,

Clements vs. Painter.

perchance, he had, at any time, bought property originally owned by the testator, and bequeathed by him in the will offered for probate.

Judgment reversed.

JOHN S. CLEMENTS, plaintiff in error, vs. WILLIAM PAINTER, defendant in error.

Where a suit was brought to the City Court of Augusta, for \$235 96, the jurisdiction of which does not extend to amounts under \$100, and the matters in dispute were referred to an arbitrator, and upon the return of the award, which was in favor of the plaintiff, for \$68 14, besides interest, a motion was made to dismiss the case for want of jurisdiction, as the plaintiff, by his own admission, only claimed \$81 96, it was proper in the Court to sustain the motion. (R.)

Jurisdiction. Award. Practice. Before Judge GOULD.
City Court of Augusta. May Term, 1872.

For the facts of this case, see the decision.

JAMES S. HOOK, for plaintiff in error.

H. CLAY FOSTER, for defendant.

WARNER, Chief Justice.

The plaintiff brought an action against the defendant in the City Court of Augusta, for the sum of \$235 96. By consent of the parties, the matters in dispute between them were referred to an arbitrator, who made his award that there was due the plaintiff only the sum of \$64 14, besides interest. When the award was returned to the City Court, for the purpose of being made the judgment of that Court, a motion was made to dismiss the plaintiff's case on the ground that the City Court did not have jurisdiction of it, the plaintiff's claim being less than \$100, which motion was sustained by the plaintiff excepted. It appears from the award of the

The Georgia National Bank vs. Henderson.

arbitrator, that when the plaintiff came before him, although he had sued the defendant for the sum of \$235 96, he did not claim to be due him but the sum of \$81 96. If the case had been referred to a jury for trial in the City Court, instead of an arbitrator, to ascertain the amount due, and the plaintiff had admitted before the Court that his claim against the defendant was only for the sum of \$81 96, there can be no doubt that the Court would have dismissed the case for want of jurisdiction. The admission of the plaintiff before the arbitrator, to whom the case was referred by the Court, by the consent of the parties as to the amount of his claim, when brought to the attention of the Court by the award of the arbitrator must necessarily produce the same result. The fact that the plaintiff sued the defendant for a larger amount than was actually due him by his own admission, cannot have the effect to give to the City Court jurisdiction. If the plaintiff *bona fide* claimed the amount sued for, and upon trial it had been reduced, the jurisdiction of the Court would not have been ousted on that account; but that is not the case here, the plaintiff admitted the defendant did not owe him but \$81 96, and the arbitrator found that he did not owe him that much.

Let the judgment of the Court below be affirmed.

THE GEORGIA NATIONAL BANK, plaintiff in error, vs. FELIX H. HENDERSON, defendant in error.

When a note, payable at bank, is placed in a bank for collection, it is the duty of the bank to see to it that it is properly presented for payment, and on its dishonor, to have it duly protested, and notice given to the indorsers.

When a bill of exchange payable at....., was sent to a bank for collection, and the bank treating it as a bank check, and not entitled to days of grace, presented it for payment, and had it protested, etc., on the day of its maturity, without days of grace, by means of which the indorser was discharged, and it was in evidence, that the bank was notified by the indorser at the time that he claimed the paper to have days grace :

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Held, That the bank was liable to the person who deposited the paper for collection for damages, for its negligence in not presenting the check, as required by law, and causing notice of its non-payment to be given to the indorser.

8. The present holder of a negotiable promissory note or bill of exchange is *prima facie*, presumed to have acquired title thereto before its maturity, and in a suit by the holder against the bank to which the paper was sent for collection for failing to present it for payment, and failing to notify the indorser of its dishonor, the present holder is *prima facie* presumed to have been the holder at the maturity of the paper.

Protest. Bank. Days of grace. Bank check. Presumption. Before LOGAN E. BLECKLEY, Esq., an Attorney, presiding by consent. Fulton Superior Court. October Term, 1871.

Felix H. Henderson brought case against the Georgia National Bank, alleging the following facts: That on August 4th, 1866, Massey & Herty made the following instrument, in writing :

“ATLANTA, GEORGIA, August 4th, 1866.

“*Georgia National Bank, Atlanta, Georgia:*

“Ninety days after date, pay to F. R. Bell, or order, one thousand dollars. (Signed)

“\$1,000.

MASSEY & HERTY.

“Indorsed: JOHN D. POPE, F. R. BELL.”

That Bell indorsed said bill of exchange to Pope, and Pope indorsed the same to plaintiff; that plaintiff delivered said bill of exchange to defendant for collection; that on the 2d of November, 1866, the ninetieth day from the date of said instrument, said defendant presented said bill of exchange for payment, and protested the same for non-payment without allowing days of grace on the same, by which legal action the indorsers were discharged from all liability; that the drawers are insolvent; that, by this course of action, defendant has become liable to plaintiff for the amount of principal and interest due on said bill of exchange.

defendant pleaded the general issue. It appeared from evidence that the plaintiff had originally sued the drawers indorser, John D. Pope; that he failed to recover from Pope, on the ground that he was discharged from the bill on the instrument sued on, because no days of grace were allowed on the same; that Pope received no notice of protest except the one of date November 2d, 1866; that he failed to inform the officers of the bank that said bill was entitled to protest for grace, and requested that they should not demand protest of the same, or protest it for non-payment until after three days of grace had expired; that Pope was sold to the drawers insolvent; that it was the custom of the bank to charge for collections, unless the owner of the instrument to be collected kept a deposit account with the collecting bank.

The defendant moved for a non-suit; the motion was overruled and the defendant excepted.

The jury returned a verdict for the plaintiff for the sum of \$50.

The defendant moved for a new trial, because the Court had made each of the following charges to the jury, to-wit: 1st. The following points present themselves for your consideration: 1st. Does the defendant owe the plaintiff a duty? 2d. Was that duty neglected, or negligently performed? 3d. What damage, if any, resulted from such negligence?

4th. Did the plaintiff own the bill at its maturity? On that point you may consider all the facts proven, including also the plaintiff's possession of the bill by the plaintiff. Such possession alone would be sufficient evidence of title in a suit on the instrument itself, but is not necessarily so in an action, such as the one now on trial. You may or may not find it necessary to inquire, in connection with all the other facts of the case, whether the plaintiff was the owner of the bill, did the defendant employ his agent to collect it, or to take the ordinary steps to prevent the discharge of the indorsers on its dishonor.

An agency of this kind might have been created between these parties, notwithstanding the fact that the defendant was not a party to the bill.

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fendant was the person on whom the bill was drawn, or to whom the bill was addressed. It was competent for the defendant to accept such an agency, in respect to this bill, if it thought proper to do so, and if he did accept it, its duties and obligations would be the same as if it had had no previous connection with the paper. Whether the alleged agency existed, you are to determine from the evidence, and if the evidence discloses any act done by the defendant on the line of such an agency, you are at liberty to consult the act for what you may think it worth, as tending to prove the agency. If no such agency has been established to your satisfaction, your verdict will be for the defendant. If, on the other hand, you believe from the evidence that the defendant undertook this duty, was there any breach of his undertaking?

"On the dishonor of this bill, a protest was necessary, and the indorsers were entitled to notice, either verbal or written, of such protest. A protest for non-payment before the three days of grace would be a nullity, and a notice of that protest would not avail to bind the indorsers. If, in this case, there was no other protest, that could be no legal notice to the indorsers, and they are discharged.

"If you should find that the indorsers were discharged, and that this discharge resulted from the defendant's negligence or breach of duty, while agent for the plaintiff, and that the drawers of the bill are insolvent, your verdict will be for the plaintiff for damages equal to the principal and interest of the bill."

The motion for a new trial was overruled, and defendant excepted and assigns said rulings as error.

COLLIER, MYNATT & COLLIER, for plaintiff in error. The relation of principal and agent could not exist between the parties: Smith's Mer. Law, 140; Paley on Agency, 1 Par. B. & N., 357-504. 2d. The act of the agent ratified in bringing suit against Pope: Story on Agency, 243-259; 27 Ga. R., 172; 10 Ga. R., 362; 1 *Ibid.*, 4; McLean's R., 569. 3d. The defendant was only bound

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notify the holder of non-payment; 2 Am. L. C., 666; 3 Ala. R., 207; Smith's Mer. Law, 145; 5 Mason's R., 566; 9 Met. R., 79. The fault was not in nonfeasance but misfeasance: Paley on Agency, 71; 1 H. Black. R., 161. 4th. If indorser had notice no demand was necessary: 1 Par. B. & M., 367. 5th. Charge as to liability of bank was error: 1 Par. on B. & N., 480; 10 Cush. R., 582.

W. EZZARD; HULSEY & TIGNER, for defendant. 1. Bank liable for defective notice given by which indorser is discharged: 6 Hill. R., 648; 22 Wend. R., 214; 19 Barb. R., 391.

McCAY, Judge.

1. The general principle that a bank or any other collection agent taking a negotiable paper for collection is under obligations to have it duly protested for non-payment, seems unquestionable. The agent has the possession of the paper; generally the owners are at a distance; the notary will present and protest *only such* papers as are presented to him, and the duty is not on the agent to see to it, there is, ordinarily, nobody in a situation to do it. And such is the current of authority.

2d. This Court has decided, on this very paper, that it is a bill of exchange, and not a bank check; that it was entitled to grace, and as it is payable at and by a chartered bank, that protest and notice are necessary to bind the indorsers: *Henderson vs. Pope*, 39 Georgia, 361. I do not propose to go over the reasons for that decision; there is no doubt but that authorities may be found, and some of them of high character, in which such a paper as this has been held to be a bank check. One of the strongest of these cases is a decision by a no less able Judge than Judge Story. But the current of the decisions appears to be that if the element of *credit* enters into the paper it is not a bank check, and that the mere making of the paper payable at a future day, being *in itself* an element of credit, makes it a bill of exchange, and not a bank check. A check is an order to the bank to pay the money of the drawer to the payee—it is an *appro-*

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priation of money—cash. A bill of exchange is a matter of credit. It is drawn, looking to the future. The element of credit enters into it. This paper was not only payable at a future day, but it was avowedly *not* drawn upon the drawer's funds, and this the bank well knew, since its own books informed it that he had no funds there. Besides, this paper was *indorsed*, guaranteed by two indorsers other than the payee, and this appeared on the face of the paper. There was, therefore, none of the elements of a check in this paper, except that it was drawn upon a banker. Payable at a future time, not drawn upon any funds and guaranteed by two indorsers, it was a bill of exchange, issued and taken upon the *credit* of the drawer and indorsers.

Assuming, therefore, that this is a bill of exchange, and that by the failure of the bank to have it duly presented on the third day of grace, and due notice to be given to the indorsers, they were discharged as we have decided in the case of *Henderson vs. Pope*, it follows that the holder has lost his right to go on the indorsers by the fault or negligence of the bank. *Prima facie*, the bank is liable for negligence just as other agents are. But it is said that agents of all kinds, except carriers and innkeepers, are only liable to ordinary diligence, and this is true. A lawyer, doctor, or mechanic, indeed, any agent is not bound at all events. Ordinary skill will excuse a mishap, even of a doctor or lawyer, and it is said that this being a doubtful matter, the bank, having acted in good faith, is not liable, because it misapprehended the law. A case very much in point is cited, and cases looking down this general doctrine of the degree of diligence required of agents undertaking to transact business, are numerous. For myself, I should have great doubt as to the liability of the bank, except for one thing. Whether it was a bank check or a bill of exchange may have been a doubtful matter—one upon which even lawyers, nay, judges of great eminence, may differ. But the bank was distinctly informed by Mr. Pope, the indorser, that it was cashed on the third day of grace. In other words, that it was considered

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him as a bill; as to him this would have clearly been a waiver of presentment on the first day of the three. A presentment and notice on the third day would have bound him in any event. This notice of Pope to the bank should have put the bank officers upon their guard. It was easy to have presented it on both days, and given notice of the non-payment on both days. Admitting that it was doubtful whether it was entitled to days of grace or not, attention was called to the fact by Pope's notice. It was an easy thing, and one that would occur to any prudent man to present it on both days. The bank was not obliged to decide the doubt. It might well have managed so as to save the plaintiff's right against the indorser's, in either event. Pope notified the bank of his claim that it was a bill. Was it not ordinary prudence to so act as to bind Pope, even if it was a bill? If there was but one way open, and the right way doubtful, ordinary skill, in determining the right way, may be all that is required. But here there were two ways open. One of them was sure. It was easy to take both. Notice was given that the way proposed was wrong. In my judgment, ordinary prudence required both to be taken, and for that reason I think the bank liable.

3d. *Prima facie*, notes over due are not negotiated; they are dishonored—suspicious. *Prima facie*, every man who has a possession of a negotiable paper took it before due. Henderson has this paper now; the presumption is he had it before and at its maturity. And we think this is as well true in a suit of this kind as in a suit on the note. It was not necessary, therefore, for Henderson to prove that he was the holder of the paper at maturity.

Judgment affirmed.

WARNER, Chief Justice, concurring.

The plaintiff brought his action against the defendant to recover damages for carelessly and negligently performing duty in relation to the collection of a certain bill of ex-

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change, placed in its hands for that purpose, of which the following is a copy :

“ ATLANTA, GEORGIA, August 4th, 1866.

“ Georgia National Bank of Atlanta, Georgia, ninety days after date, pay to F. R. Bell or order \$1,000.

(Signed)

“ MASSEY & HERTY.”

Indorsed, “ F. R. BELL, JOHN D. POPE.”

The plaintiff alleges that the defendant protested the bill and gave notice to Pope, the indorser, (the only responsible party to the bill,) the day it became due, without allowing the three days of grace, as he should have done, whereby Pope, the indorser, was discharged and he lost his debt. When the case of *Henderson vs. Pope* was before this Court at a former term, (see 39 *Georgia Reports*, 361,) this Court held and decided that the above described paper was a bill of exchange, and not being payable either at *sight* or on *demand*, was entitled to the three days of grace before being protested for non-payment, and that Pope, the indorser, was discharged. And the question now is, whether the defendant is liable, under the law, to the plaintiff for the loss which he has sustained in consequence of the negligent and unskillful manner in which it performed its duty in undertaking to collect the bill placed in its hands for that purpose. Contracts implied by reason and construction of law, arise upon the supposition that every one who undertakes any office, employment, trust or duty, contracts with those who employ or trust him to perform it with integrity, diligence and skill; and if, by his want of either of those qualities, any injury accrues to individuals, they, therefore, have their remedy in damages by a special action on the case: 3 Blackstone's Commentaries, 163. The defendant undertook to collect the plaintiff's bill for the customary compensation, and was bound to exercise the necessary skill and diligence for the accomplishment of that object, to know when the bill became due, and in case of non-payment to have it protested, and due notice given to the parties thereto in the manner required by law; and if the defendant failed to do so, it is liable to the plaintiff for

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the damages sustained in consequence of such failure and unskillful conduct. The defendant was bound to know, when it undertook the collection of the paper for the plaintiff, that it was a bill of exchange, that it became due on the last day of grace, the same not being due at *sight* or on *demand*, that in case of non-payment on the last day of grace, it should then be protested and notice given to the indorser in order to hold him liable for the payment of the bill. If the defendant did not know these things, then it ought to have taken down its sign and quit the business of collecting commercial paper. The defendant, however, did seem to know that the bill should be protested for non-payment, and notice given to the indorser, and undertook to do it, but did it in such a negligent and unskillful manner that the indorser was discharged in consequence thereof, although the evidence on the record shows that the defendant was requested not to protest the bill for non-payment until the last day of grace.

But it is said that the defendant did not know that days of grace were allowed on this bill of exchange. Well, all I have to say in regard to that is, that such has been the law, at least, ever since Blackstone wrote his commentaries on the common law, and has been so recognized by the commercial world ever since that time, and long before. It is also said that the defendant did not know that the bill of exchange was entitled to the three days of grace because it was drawn upon and payable at a chartered bank. A chartered bank is an artificial person, and a bill of exchange may as well be drawn upon and made payable to an artificial person as to a natural person, the three days of grace are allowed as well on bills drawn upon and payable to artificial persons as to natural persons; there is no distinction as to the time when a bill of exchange becomes due between one drawn upon and payable at a bank and one payable to a natural person; both come due on the last day of grace, unless, under our Code, a bill is payable at a bank *on sight* or *on demand*. Why should there ever have been any difference as to the allowance of days of grace between a bill drawn upon and paya-

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ble to a chartered bank and one drawn upon and payable to a natural person? The truth is, the same principles of commercial law apply to both, so far as the allowance of days of grace are concerned, and did, when this bill of exchange was placed in the defendant's hands for collection, except checks drawn on a bank payable at *sight* or on *demand*.

To say that any *doubt* existed among lawyers or commercial bankers as to whether a bill, drawn upon and payable to a chartered bank ninety days after date, was not entitled to the three days of grace at the time the paper was placed in the defendant's hands for collection, would be to impeach their knowledge of commercial law for the purpose of making out a *plausible* defense for the defendant in this case, which the law does not uphold or sanction: *Downer vs. The Madison County Bank*, 6 Hill's N. Y. Rep., 648. Having concurred in the judgment of this Court, in *Henderson vs. Pope*, that the indorser was discharged for the want of a legal protest and notice to him, I will not now *stultify* myself by holding that the defendant is not liable for its negligence and unskillful conduct in causing the plaintiff to lose his debt. In my judgment, there was no error in the charge of the Court to the jury, and the verdict was right, under the evidence in the case.

MONTGOMERY, Judge, dissenting.

In this case, I am constrained to dissent from my associates. The judgment, as it seems to me, assumes the very point in controversy. If the paper, drawn by Massey & Herty upon the plaintiff in error, is a bill of exchange, they are right and I am wrong. If a bill of exchange, it is entitled to grace; if a check, it is not. To say that no doubt exists among lawyers or commercial bankers upon this question is to ignore the discussions upon the subject which have taken place during the last forty years. The case of *Downer vs. The Madison County Bank*, 6 Hill, 648, relied on by the Chief Justice to sustain this, as it seems to me, somewhat

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asty assertion, does not touch the point. No question was raised there as to whether the note, which was left with the defendant for collection, was entitled to grace or not. Through negligence, proper notice was not given to an indorser, and the bank was held liable. Indeed, no contest seems to have arisen as to whether the bank was liable for the amount of the note or not, but whether it was liable to the plaintiff for its expenses incurred in a fruitless suit against the discharged indorser. The Court held the bank not liable for such expenses. Is there, then, any doubt upon this question among lawyers and commercial bankers? The opinion of the latter may be somewhat difficult to ascertain in this discussion; that of the former is readily accessible. Indeed, the *usage* of bankers—not their opinions—make the law. That usage becomes law when, in the opinion of lawyers, it is so uniform as to raise a presumption that the contracts of parties were made in reference to it.

It may be conceded that at one time the number of authorities was, with the majority of the Court, in holding a draft upon a bank payable at a future day, to be a bill of exchange, and not a check. It is equally true that some of the courts, which have so held, are now endeavoring to struggle back to the rule laid down by Judge Story, in the matter of *Bank of Albany*, 2 Story's Reports, 502, which is a thoroughly considered opinion by that learned jurist, and while it is true he has no doubt upon the subject, yet he comes to directly the opposite conclusion from that arrived at by this Court in *Henderson v. Pope*, 39 Georgia, 361. Chancellor Kent seems to coincide with Judge Story: 3 Kent's C., 105 n. In Rhode Island the following order was held to be a check, and without right days of grace: "Westminister Bank, ninety days after I pay to the order of J. W. \$450:" 5 R. I., 31. In California and Louisiana it is held otherwise: *Minturn vs. Fisher*, 12 Cal., 35; 14 Louisiana Ann., 457, *Successor of Kercheval*. This is the rule as adopted by this Court in 39 Georgia was followed broadly at first in *Morrison vs. Bailey*, 5 Ohio, 16. In *Andrew vs. Blackly*, 11 Ohio State, 89, the

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pressure of the *usage* among bankers seemed to be too great for the Court, and it is there laid down that if a draft for money, otherwise in the usual form of a check, is payable on a future specified day, it is *prima facie*, but not necessarily a bill of exchange; and that when such instrument is drawn upon a bank or banker, and is designed by the parties as an absolute transfer and appropriation of an actually existing fund belonging to the drawer in the hands of the drawee, it is, nevertheless, a check, and not a bill of exchange, and not entitled to days of grace. It is submitted with deference, that this distinction is worse than the rule laid down in *Ohio State*, 16. If the latter decision is the law without qualification, and without reference to usage among bankers, the *bona fide* holder of such a paper knows at least what to do to charge indorsers when the bank fails to honor the draft. But under the qualification contained in 11 *Ohio State*, he must act at his peril, and his action will be valid or not, accordingly as the evidence in a suit brought against an indorser may show the paper to be a bill of exchange or check. Possibly the report itself may suggest a solution of this difficulty. I have it not at hand, and am compelled to rely on the report I find of it in Hare & Wallace's *Notes to 1 American Leading Cases*, 5 Edition, 484. In Tennessee occurred the first case, within my knowledge, reported in this country, in which a bank check, payable at a future day, was held entitled to days of grace: *Brown vs. Lusk*, 4 Yer., 210. This case was decided prior to Judge Story's decision in the matter of *Brown*, and was before him when he made that decision, as we have seen he declined to follow it. How stand the question in Tennessee now? At the December Term, 1871, of the Supreme Court of Tennessee, the following paper is held to be a bank check, and not a bill of exchange:

"CLARKSVILLE, TENN., March 11th, 1865

"Ten days after sight, pay to the order of E. W. [illegible]
\$2,000, in currency, value received, and charge same to [illegible]
count. (Signed)

"B. O. KESEE,

"Per GEO. B. FAXON, Cashier

"To Sturgeon, Clements & Co., Louisville, Ky."

McFarland, Judge, in delivering the opinion of the Court, said: "Without entering fully into a discussion of the authorities, for they are numerous, it will be sufficient to say that the mere fact that the paper is drawn payable at a future date, or so many days after sight, does not necessarily establish that it is not a check. There are other considerations affecting the question. If it is drawn upon a bank or bankers, and is designed by the parties as an absolute transfer and appropriation to the holder of so much of an actually existing fund belonging to the drawer, and in the hands of the drawee, it will in general be regarded as a check, and not a bill of exchange." Herring *et al.*, vs. Kesse, M. S., op. December, 1871, reported in Southern Law Review, October, 1872, p. 613. This undoubtedly overrules Brown vs. Lusk with the usual reluctance of Courts to say *in totidem verbis*, that they overrule a prior decision, Judge McFarland said, "in Brown vs. Lusk, the drawer had no funds in the bank upon which he drew, and this was probably the distinguishing feature in that case." The author of the article from which the foregoing is extracted, says: "The attempt of Judge Cowan in the well known case of Harker vs. Anson, 21 Wendell, 272, to show that bank checks are bills of exchange, and nothing more, and hence in all things subject to the same rules of law, received but little favor from the profession, and it is now well settled that these instruments constitute a class *sui generis* subject to rules different from many important regards, from those applicable to other species of negotiable paper." And yet this Court in Henderson vs. Pope, 39 Georgia, relies on this case as settling the question under discussion. I do not undertake to define what a bank check is; that, perhaps, were beyond my power. But I do say that an instrument, conceded to be a bank check in every essential particular, except that it is payable on demand subsequent to its date, is, nevertheless, still a bank check, and not a bill of exchange; and, therefore, is not entitled to days of grace. The last decisions in Tennessee would seem to go the length of holding every draft upon a

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bank or banker a check, and not a bill, unless the paper showed on its face that it was intended to be a bill of exchange: See *Herring et al., vs. Kesse, supra*, and *Planter's Bank vs. Kern*, and same *vs. Merritt*, administrator, all decided December Term, 1871, quoted in the Review already referred to.

The most recent decision in Pennsylvania goes quite as far as those of Tennessee. In *Champion vs. Brown*, recently decided by the Supreme Court of Pennsylvania, and which I find reported in the *American Law Register* for January, 1873, page six, the precise point under discussion arose, and a check payable at a future day was held not entitled to grace, and properly protested on the day it appeared due by its face. I will remark here, in passing, in reply to the argument that section 2742 of our Code settles the law in Georgia to be, that all commercial paper, not payable on demand or at sight, is entitled to grace; that the same argument was urged in *Champion vs. Brown*, on the Pennsylvania Act of 1855, which reads as follows: "All drafts and bills of exchange drawn at sight shall be and become due and payable on presentation, without grace, and shall and may, if dishonored, be protested on and immediately after such presentation." The Court disregarded the argument. Compare the statute, as quoted, with the section of our Code referred to. They are substantially the same.

In New York, the decisions have been very much fluctuated on this point. At first, Judge Story's rule was adopted: 5 *Sandford*, 326; 2 *Duer*, 584. Afterwards, these cases were overruled: *Bowen vs. Newell*, 4 *Selden*, 190. And again, with qualifications, in the same case: 3 *Kernan*, 290. The instrument in question in this case was drawn in New York upon a bank in Connecticut. The decision was based broadly upon the wording of the paper, which called for payment on a day certain after the date, and the Court held it to be a bill of exchange, *but not entitled to grace*, because, they say, that it appeared, from the findings of the lower Court, that the law in Connecticut gave no grace on paper of this descrip-

, therefore, of course there could be none, and that
ings of the lower Court were "upon evidence de-
the best sources, and of the most unquestionable
" A late writer remarks upon this: "This ad-
vidence was simply evidence of *usage*. The Court
sist that this rule is not at variance with the rule
by them, on the same point, in 4 Selden, 190. It
a Court to cling to its consistency, and we can par-
rate efforts of technical ingenuity directed to that
nd. But the naked statement in 3 Kernan, that
ot contradicting the doctrines in 4 Selden, our in-
forbids us to credit. However, the 3 Kernan rule
e best in sense and latest in time, and may be re-
conclusive of the views of the New York judi-
forse on Banks and Banking, 247. If this be so,
ave gotten back to the law as laid down by Judge

ay call a draft like the one before us a bill of ex-
you please; the substantive question is, is such a
tled to days of grace? And if evidence of usage
ceived, I apprehend the question is settled. What
has claimed days of grace on such paper? What
ld dare to claim them? What would its business
in a commercial community an hour after such a
known to have been made? Suppose a merchant
a, who bought goods in New York at ninety days,
note for them, and, a few days before it falls due,
return to New York to make new purchases. His
l him his note will become due three days after he
He draws upon his banker and makes his check pay-
ie day his note falls due, and leaves for New York
confidence that the note will be met at maturity.
is notified that the note is deposited in one of the
anks for collection, his clerk presents the check left
at his bankers; the reply is, "Yes, there are funds
et it, but the paper presented is not a check, it is
exchange, payable at a day subsequent to its date;

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we claim three days of grace on it." The note goes to protest, and the merchant, by this time in New York, is astonished to find in the hands of the payee a telegram announcing the protest, and that his credit is shaken. Again, a gentleman, whose insurance policy is nearly run out, desires to leave the city, and to be absent for some length of time. He leaves a check at his insurance office for the next year's premium, payable on the day the policy expires; it is presented, days of grace claimed, a failure to insure the consequence, where the premium is strictly required in advance, and his goods or house burned during the three days of grace. The practical reply to all this is, that no bank will be so short-sighted as to avail itself of the privilege extended to it by the Courts. But that does not meet the difficulty when it becomes necessary to charge an indorser. The illustrations are given to show that the uniform usage must be, (as, in fact, it is,) with all banks, to pay such checks on the day they fall due, without grace, if presented. If such be the usage of the banks, what is the contract of the indorser? Let it be borne in mind that checks upon banks, payable at a future day, are a comparatively recent innovation upon commercial usage. "A great portion of the mercantile law of this country, as well as of England, has been derived from mercantile usages, which have from time to time incorporated themselves with, and finally become settled rules of the common or unwritten laws of both countries:" Opinion of Chancellor Walworth, in *Allen vs. Merchants' Bank of N. Y.*, 22 Wend. 222.

"The law merchant was not made. It grew. Time and experience, if slower, are wiser law makers than legislative bodies. Customs have sprung from the necessities and convenience of business, and prevailed, in duration and content, until they acquired the force of law. This mass of jurisprudence has grown, and will continue to grow, by successive accretions:" Judge Swayne, in *Merchants' Bank vs. State Bank*, 10 Wallace, 647. In that case, one of the questions raised was, were the drafts sued on checks or bills of exchange.

change? They were in the ordinary form of checks, but certified by the cashier of the State Bank as "good." A two cent stamp only was on each check. It was contended that a certificate of the cashier was equivalent to an acceptance; and, therefore, the papers were bills of exchange and were not properly stamped. The Court held the drafts to be checks. In the course of his remarks, Judge Swayne takes occasion to point out the difference between bills of exchange and bank checks. He says, "Bank checks are not inland bills of exchange, but have many of the properties of such commercial paper, and many of the rules of the law merchant are alike applicable to both. Each is for a specific sum, payable in money. In both cases there is a drawer, a drawee and a payee. Without acceptance, no action can be maintained by the holder upon either against the drawee. The chief points of difference are, that a check is always drawn on a bank or banker. No days of grace are allowed. The drawer is not discharged by the *laches* of the holder in presentment for payment, unless he can show that he has sustained some injury by the default. It is not due until payment is demanded, and the statute of limitations runs only from that time. It is, by its face, the appropriation of so much money of the drawer, in the hands of the drawee, to the payment of an admitted liability of the drawer. It is not necessary that the drawer of a bill should have funds in the hands of the drawee. A check, in such a case, would be a bill." Judge Swayne, in the foregoing quotation, has noted every conceivable difference between a check and an inland bill of exchange, save the one now under discussion, which exists. He nowhere says that a check is never made payable at a future day. If, in his opinion, such a distinction existed, he would probably have said so.

In further illustration of the practical inconvenience of applying a commercial community to a technical rule of law not intended to apply to a paper like the one under consideration, suppose a check of this character drawn on a bank solvent on the day the check, according to its face, is

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payable. The holder knows the usage of the bank to pay such checks without grace, and yet neglects to present it on the day named for payment in the check. Within the three succeeding days the bank fails. Can he hold the drawer liable by going through the form of presenting it at the bank for payment on the third day after the day on which he might, with proper diligence, have obtained his money?

If Chancellor Walworth and Judge Swayne are correct (as undoubtedly they are) in saying the law merchant grew and will continue to grow, it is hardly safe to rely entirely on what was considered to be the law in questions of this character when "Blackstone wrote his commentaries on the common law." Perhaps a too strict reliance on what was then considered to be the law merchant, without taking the trouble to investigate its subsequent growth as found in the later decisions and in the ever-varying *usage among merchants*—its very soul and spirit—may have led some of our Judges into the error of holding obsolete ideas as living law. Certain it is, in this country, that the Courts of New York, the commercial centre of the country, are now disposed, as already shown, to let in evidence of *local* usage to show that a check payable at a future day is not entitled to grace. This, it is respectfully submitted, abandons the whole controversy. If local usage will make the law for a particular case, universal usage should make that law general. And whenever the Courts will permit evidence of usage on the part of the banks in paying these checks, I hazard nothing in saying it will be found to be universally true that the banks pay these without demanding days of grace. And if this is so, it answers the question as to what the contract of the indorser is. It can be nothing else than an engagement to pay the check if the bank fails to do so *according to the agreement of the drawer*, to-wit: on the day it falls due, without grace.

That evidence of usage of the bank is admissible to bind the parties even though they were ignorant of the usage and that usage varied the law so far as to admit of protest

on the fourth instead of the third day after a note is, by its face, payable: See *Bank of Washington vs. Triplett*, 1 Peters, 32-3; *Mills vs. Bank of the United States*, 11 Wheaton, 30; *Benner vs. The Bank of Columbia*, 9 Wheaton, 582. In 11 Wheaton, the Court say: "When a note is made payable or negotiable at a bank, whose invariable usage it is to demand payment, and give notice on the fourth day of grace, the parties are bound by that usage, whether they have a personal knowledge of it or not." If usage can add one to the number of days of grace, why may it not strike three off? "In the case of such a note," say the Court again, "the parties are presumed, by implication, to agree to be governed by the usage of the bank at which they have chosen to make the security itself negotiable." In case of a check payable at a future day, the parties are presumed, by application, to agree to be governed by the usage of the bank at which they have chosen to make the security itself payable. The analogy, in principle, seems to me to be so close that it amounts to identity.

Our own Code, sections 3751-3752, provides that "the surrounding circumstances are always proper subjects of proof to aid in the construction of contracts."

"In like manner evidence of known and established usage is admissible for the same purpose *as well as to annex incidents.*" If to annex incidents, why not to show that they do not attach?

Mr. Morse, in his treatise, already referred to, page 379, again says: "The latest authority in New York is the decision in the case of *Bowen vs. Newell*, as last rendered and revised, published in 3 Kern., 290. Here the Court say that the lower Court have found that the law in Connecticut, where the paper was payable, gives no days of grace upon it; that this finding of the law was upon evidence derived from the best sources and of the most unquestionable character." Turning to the report of the cause in the lower Court, (2 Kern., 584,) we find that this so emphatically excellent evidence, which was allowed so thoroughly to settle the law,

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was simply evidence of the usage of banks and of persons dealing with banks in Connecticut. The Court escape the trouble of reconciling this view with their former contrary one, by the arbitrary assertion that in 4 Selden they only held that, *by the law merchant*, the instrument was not (was?) entitled to grace. This assertion will satisfy nobody, for it is not true. But its degree of accuracy is a matter of little moment, since the last ruling in 3 Kernan is too clear and positive to leave any doubt as to the law in New York State.

"The doubt is simply whether or not the allowance or disallowance of grace upon a certain anomalous description of paper is a proper subject of usage. Why it should not be so, it is difficult to say. It is clear that such paper, whether it be called a check or a bill of exchange, is a materially modified form of either. It is in fact an independent species of paper. When, therefore, it is considered that the entire principle which gives days of grace upon particular species of commercial paper was, in its origin, wholly a matter of usage among bankers, there seems no reason why the same usage, if actually shown to exist, should not be properly extended to still another species of paper of comparatively modern origin.

"It is clear that the allowance of grace on business paper is a proper subject of usage since it owes its very existence to usage."

Why were days of grace ever allowed on commercial paper? For no other reason than as an indulgence to give the drawee, who owed a debt to the drawer, time to call in his resources to meet the demand: Story on Promissory Notes, section 215-223. In the case of a check upon a bank, whether payable on demand or at a future date, the case is different. It is simply a transfer of funds of the drawer *ex deposit* to the payee. In legal contemplation, and in fact, the funds are in the vaults of the bank to meet the check. Then should grace be allowed? Ceasing the reason, the grace should cease. With regard to the case of *Harker vs. Anderson*, 21 Wendell, 372, relied on by Judge Warner in *Anderson*

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son *vs.* Pope, as sustaining the position that a check is a bill of exchange and therefore entitled to grace, in addition to what has already been said, I have two remarks to make, 1. The only question then before the Court, and *decided* on it, (see the Chief Justice's and Bronson, Justice's, concurrence, 389,) was, is a drawer of a check entitled to notice of non-payment? Decided that he was. 2d. The opinion of the Court, Judge, that "a check is a bill of exchange" is not supported by the case, and is at variance with all recent authorities. See the opinion of Judge Swayne, quoted *supra*, which will be found to correspond with that of Chancellor Kent, Judge Story and others.

I think I have said enough to show that it was at least a very doubtful question in Georgia before the case of Henderson *vs.* Pope, whether a draft on a bank, payable at a future date, but in other respects drawn like an ordinary check, was entitled to days of grace or not.

2. If the question was as doubtful, as I insist it was, then surely the bank which, in its character of collector, was a bailee for hire, and bound only to use ordinary diligence, could not be held responsible for the mistake made in the absence of any instructions from the holder as to when it should be protested. That the only responsible indorser on the note told the bank officers that the paper was entitled to grace, can make no difference. Without for a moment intimating that in this case the indorser would do such a thing, but it was his *interest* to mislead them; a mistake ensured to his benefit. Suppose he had advised them wrongly and they had acted on his advice, would such an excuse have been listened to? The dictates of ordinary prudence in such a case would teach them to beware of a gift-bearing Greek. See *Mechanics' Bank of Baltimore vs. Merchants' Bank of Boston*, 6 Metcalf's Reports 13, was just such a case as the present. That was a suit against the defendant for not protesting for payment, and protesting for non-payment, a note of a bank which had failed between the time of issuing the note and the time it fell due. In the margin of

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the note was written "Due July 12th, 1837, \$1,000, interest \$11,25; no interest payable after due;" there were several indorsers on the note. The note was presented and protested on July 12th, instead of July 15th. The evidence showed that the banks never claimed grace on post notes. The Court held that the indorsers were discharged by reason of a positive statute of Massachusetts giving days of grace "on all promissory negotiable notes, orders and drafts, payable at a future day certain," but they held that the defendant was not liable because the question was so doubtful a one, which excused them for looking rather to the usage than to the statute controlling the question. At least as grave a doubt existed in Georgia before the case of *Henderson vs. Pope*.

Hence my dissent.

JOHN C. VARNER, plaintiff in error, *vs.* JAMES S. BOYNTON
et al., defendants in error.

1. Where, in a marriage settlement, certain property was settled upon the wife for life, remainder to the husband for life, remainder to the heirs general of the husband:

Held, That the husband took a vested remainder in fee.

2. That where the husband, with the consent of his wife, invested a portion of the estate so conveyed in real estate, taking from the vendor a bond for titles, his heirs-at-law have no right to follow the proceeds to the injury of the vendor, a portion of whose debt is still unpaid.
3. Where the husband has diverted a portion of the income of the trust estate, and invested the same, without the consent of the wife, in real estate, and subsequently, with her consent, invested a portion of the *corpus* of the estate, in the same real estate, the heirs-at-law of the husband have no right in the remainder of the *corpus*, as against the right of the wife to be reimbursed for so much of the increase as was so diverted and invested.

Marriage settlement. Separate estate. Remainder. Butts county. Judge GREEN. Butts county. At Chambers. February 16th, 1872.

John C. Varner filed his bill, containing, substantially the following allegations, to-wit: That Cynthia H. Varner,

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marriage with Edward Varner, was the widow of John n, and as such was possessed, in her own right, of prop- amounting to \$15,000, or other large sum; that said r, in the year 1823, married Edward Varner, having ous to the performance of the marriage ceremony, en- into a contract with her said intended husband, by it was agreed that all the property of the said Cynthia ould remain and be her separate estate for and during tural life, but after her death to go to the said Edward r, for his lifetime, and after his death, to the said Ed- s heirs generally; that one Jackson Fitzpatrick was ted trustee for said property and took charge of the permitting the parties aforesaid to remain in the pos- s, use and enjoyment of said trust estate; that, in the 849, three children of said marriage had arrived at the twenty-one years, to-wit: Jefferson M., Andrew J. Clinton L. Varner; that complainant, also a child of arriage, was a minor; that complainant's three brothers, year last aforesaid, purchased of one Henry Dillon, deceased, a certain lot of land in said county of Butts, the Indian Spring Reserve, with valuable improve- thereon, upon the following terms, to-wit: \$3,000, to d January 1st, 1850; two notes for \$2,000 each, the ue December 25th, 1850, and the second, December 1851; that Edward Varner became security for the nt of said sums, as per contract; that said Edward, it the knowledge or consent of said Cynthia H. Varner, the first payment of \$3,000 out of the funds of the id trust estate; that it was contracted between the said and Andrew J., Jefferson M. and Clinton L. Varner the last payments due upon said purchase were not tly met, said Dillon was to retain all previous pay- as rent, and also the right to re-enter; that Cynthia covering how much of her trust estate was vested in roperty, deemed it advisable to prevent a forfeiture of yments already made, by meeting the last notes as they e due out of the same fund; that in this way \$5,500 of

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the separate trust estate of Cynthia H. was invested in said property; that said Cynthia H. and her said sons, the purchasers of said property, entered into an agreement by which it was contracted that said purchase, to the extent of the investment of the said Cynthia H., should be her separate property, subject to the limitations and remainders mentioned in said marriage contract; that said Edward, Andrew J., Clinton L. and Jefferson M. Varner became insolvent, and judgments to a large amount were recovered against them; that said Cynthia H., by her next friend, her said trustee having died, filed her bill to March Term, 1859, of Butts Superior Court, asking that said property, to the extent of her investment in the same of her separate estate, might be decreed to be her separate trust property, and that the judgments aforesaid might be perpetually enjoined from selling the same; that, at the September Term, 1871, of said Court, it was decreed that all payments which had been made upon said property, amounting to \$7,000, had been out of the separate property of the said Cynthia H., and that said property be vested in her; that James S. Boynton, as administrator of said Henry Dillon, filed his bill to the September Term, 1870, of Butts Superior Court, against said Cynthia H. and Josephine Varner, as administratrix of Andrew J. Varner and Jefferson M. Varner, (both of whom had previously died,) to enforce a vendor's lien in favor of the estate of said Henry Dillon for the unpaid purchase money on said real estate before described; that, at the September Term, 1871, of said Court, James S. Boynton, administrator, obtained a decree for \$2,000 as the balance of the purchase money due to the following effect: that said lots are bound to pay said sum of money before any other lien or debt, that all the balance of said purchase money had been paid with funds belonging to the separate estate of Cynthia H., that said lots and improvements be sold at public outcry, on the premises, at Indian Springs, by Robert Trippe, Esq., and James S. Boynton, as commissioners. That said Cynthia H. has attained to the age of seventy-five years and is too old and too feeble to attend to any kind of

ess; that her daughter, Josephine Varner, a woman of more than ordinary intellect, will and energy, has obtained absolute control and dominion over her, in all respects, and by whose influence and direction the said decree in favor of the said James S. Boynton, administrator, was consented to on the part of the said Cynthia H., there being, at that time, no such amount due as \$2,000 to the estate of said Dillon; that complainant as one of the heirs-at-law of Edward Varner, deceased, and as a remainderman, is interested in the trust property so sought to be sold, and in which it has been decreed and found that the trust estate of said Cynthia H. is interested to the amount of \$7,000, and, though complainant as a resident of said county of Butts, he had no knowledge of said decree, nor was he made a party defendant to said suit; that said Josephine Varner, having complete control of her said mother, is colluding with said Boynton, as administrator, as aforesaid, to secure to herself all of the aforesaid property, to the exclusion of the other remaindermen; that said Josephine has publicly boasted that such was her intention; that the investment of the trust property of said Cynthia H. should first have been decreed to be refunded to her, or to a trustee appointed by the Court, before the said claim of the said estate of Dillon should have been allowed; that said Dillon, when in life, and his executor, after his decease, received the payments upon said property aforesaid, with a full knowledge that the same came from the separate estate of said Cynthia H.: prayer, that a trustee or receiver may be appointed for said property to litigate and defend, not only the rights of the said Cynthia H., but also more especially of her orator and the other remaindermen; that the same may be preserved and protected for the support and maintenance of the said Cynthia H., during her life, and the interest of complainant, as a remainderman, after her death; that the decree in favor of James S. Boynton, administrator, be vacated; that a trustee be appointed to represent said separate estate; that in case said property should be sold under said decree, that the proceeds thereof may be impounded, subject

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to the further order and decree of the Court; that the aforesaid sale be enjoined until the further order of the Court; complainant waives discovery.

The bill was presented to Judge Greene who issued a rule *nisi* requiring defendant to show cause why an injunction should not issue in accordance with the prayer of the bill.

Upon the hearing the affidavit of James S. Boynton, administrator as aforesaid, was read, to the effect, that after allowing all credits there was still due on the execution in favor of Dillon's estate against J. M. Varner, A. J. Varner, and Clinton L. Varner, makers, and Edward Varner, security, the sum of \$4,500; that the decree was taken for \$2,000 only, by way of compromise, and at the earnest solicitation of counsel for defendant, thus knocking off \$2,500; that the property will not sell for more than from \$3,500 to \$4,000.

The injunction was refused, and plaintiff in error excepted, and assigns said ruling as error.

SPEER & STEWART; PEEPLES & HOWELL, for plaintiff in error.

JAMES S. BOYNTON; R. P. TRIPPE, represented by JOHN J. FLOYD, for defendants.

MCCAY, Judge.

The language in which this deed undertakes to pass a remainder over, after the death of the husband, is so exact within the rule in Shelley's case, that it presents no difficulty. That rule, in substance, is simply this: that whenever there is an estate for life and remainder over, to the heirs of the first taker, the estate is absolute in the first taker, since an estate to a man for life and then to his heirs, is the largest estate one can have in land. The use of the word heirs general can make no difference. If the word "general" has any meaning, it is only that no particular heirs are mentioned; this would be the meaning if only the word heirs was used.

follows, therefore, that at the death of the wife, the husband took a fee in this property. His heirs had no interest in it, except as his legal heirs; they took nothing under the deed, more than that interest which every man's heirs have in the property he has an absolute title to, to-wit: the right to inherit if he dies intestate. This right, however, is a mere expectancy since no man has heirs whilst he lives. Whatever disposition, therefore, this husband made of this property was a disposition he had a right to make, so far as his heirs are concerned. During the life of the wife, his power over the property was limited by her rights, but at her death, under the deed, his dominion over it was absolute. During the life of the wife her assent to any act of his would bind her, even as to her life estate; and though any act of his during her life would not bind her, unless she assented to it, yet such an act, though illegal as to her, would bind these plaintiffs. They can only stand in the shoes of their father. They are not the heirs of their mother. At her death her husband inherited her rights, and if they ever came to these plaintiffs they came through their father to them. They have no rights in this property, except as the heirs-at-law of their father. If he committed any wrong to the mother's rights, at her death he fell heir to any cause of action she had in that wrong. If there was a cause of action against him he fell heir to that, and, as a matter of course, it ceased on his accession to the right. For it is a rule, as well as law, as of common sense, that a man cannot have a right of action against himself. The question here, then, is simply this: did the husband misappropriate any of this trust estate during the life of his wife? If he did, as he was himself the sole trustee, he had a right to dispose of it as he pleased. As far as the remainder is concerned, and so far as the life estate of the wife is concerned, at her death, her rights, whatever they were, fell to him. These plaintiffs have no rights here, except as heirs-at-law of the father. Did he, in this time, wrong his wife—that is, for her to complain of? Her heirs can only stand in his shoes. Had he, during his

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life, complained as remainderman, the reply would have been conclusive, you are complaining of your own act. His heirs must stand in his place; they are his privies. Any reply good as to him is good as to them.

Judgment affirmed.

WILLIAM T. DENNIS *et al.*, caveators, plaintiffs in error, *vs.*
WILLIAM J. WEEKES, propounder, defendant in error.

1. On the investigation of an issue of *devisavit vel non*, where one of the grounds of the caveat is, that the executor did, by fraud and deceit, and fraudulent and false representations, procure the testator to make the will, the admission of the executor, who takes an interest under the will, made after qualification, in reference to the conduct or act of the executor himself, as to a matter relevant to the issue, (and his statement that he had procured the testator to make the will for certain purposes is such) should have been admitted as evidence in chief. The fact that such evidence was admitted in rebuttal to impeach the executor, who testified as a witness in favor of the will, is not the full measure of the rights of the caveators, and they are entitled to a new trial on account of the rejection of this testimony as evidence in chief.
2. Where one of the grounds of caveat is undue influence exercised by the executor of the testator, in procuring him to make the will, evidence showing that the executor, as agent of the testator in 1868 or 1869, applied to the Confederate conscripting officer to have a white man exempted from military service for the purpose of overseeing the plantation of the testator, on the ground that the latter was so unsound in mind as to be incapable of attending to his own business, is admissible as evidence in chief for what weight the jury may give to it, to show the executor's knowledge of the state of the testator's mind, where the evidence, with the exception of that of the executor himself shows that the executor exerted his influence over the testator (which was proved to be very great) to have the will made, and all the witnesses testify that the testator had been a man of very weak, if not entirely unsound mind for fifteen years before his death, which occurred in 1869.
3. Evidence which ought properly to have been offered in chief, but which was then omitted through inadvertance, if offered with the relevant evidence, should be admitted if otherwise unobjectionable.
4. The paper in the handwriting of the executor, made in 1867, showing the amount of property in his hands as agent of the testator,

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proper evidence in chief, as tending to show the amount of interest taken by the executor under the clause of the will which relieved him from the payment of any balance that might be found due by him to the testator, other than that with which he is charged in the will, and should have been admitted with the rebutting evidence, where it was inadvertently omitted to be given in, in chief.

Caveat to will. Admission of executor. Undue influence. False representations. Evidence. Impeachment of witness. Before Judge JOHNSON. Talbot Superior Court. March Term, 1872.

William T. Dennis *et al.*, heirs-at-law of William Stallings, deceased, filed a caveat to the paper propounded as the will of said Stallings upon the following grounds, to-wit:

1st. That the paper propounded for probate by William Weekes as the last will of said William Stallings, is not the will of the said William Stallings, because when said Stallings signed said paper he was incompetent, from infirmity and mental imbecility, to make a will.

2d. That he did not make said paper as his last will freely and voluntarily, but made the same in consequence of the undue influence and constraint which the said Weekes then exercised over him.

3d. That the said Weekes did, by fraud and deceit, and fraudulent and false representations, procure the said Stallings to make said will.

4th. That the said Weekes used fraudulent practices upon the fears, affections and sympathies of the said Stallings, and thereby procured him to sign said paper as his will.

The paper propounded as said will was as follows :

STATE OF GEORGIA—TALBOT COUNTY :

In the name of God, Amen.

I, William Stallings, of the county and State aforesaid, being of sound and disposing mind and memory, but being somewhat advanced in age, deem it right and proper to hereby ordain, publish and declare my last will and testament, and after having had the same under contemplation

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for several days, do hereby ordain, publish and declare this instrument of writing to be my last will and testament, hereby revoking and annulling all former wills or codicils heretofore made by me.

"Item 1st. I desire a decent burial, suitable to my circumstances and condition in life.

"Item 2d. At present I am owing but little, but should there be any debts due by me at the time of my death I direct that they be promptly paid.

"Item 3d. As my son-in-law, William J. Weekes, has had control of my papers and money, and as we have this day settled, and in which settlement he has exhibited and shown a list of paper amounting to \$30,430 65, to which he has accounted for cotton and money to the amount of \$7,995 40, making in the aggregate, now in his hands in paper and money, the sum of \$38,426 05. Should there have been anything omitted in our settlement, I do hereby relieve him from the payment of the same, and do give the same to him.

"Item 4th. The above amount being so in the hands of William J. Weekes, and mostly in paper, it is my will and desire, and I do hereby give and bequeath unto my daughter Virginia A. Stallings, on the terms and conditions hereinafter specified, one-half the same. Also, one-half all my other property, real and personal, of every kind and description; all of which is to go into the hands of William J. Weekes as trustee of my said daughter, for her sole and separate use, and not to be subject to the debts of any husband she may hereafter marry. Should she die without having or bearing any living child or children, then the said property so given my daughter Virginia A., is to become the property of my grandchildren, Julia J. Weekes, Mary Ann Weekes, and James H. Weekes, children of my daughter, Martha Weekes deceased, said property not to be liable to the control of her husband of said Virginia.

"Item 5th. All the remaining portion of my estate, one-half of said effects, so in the hands of William J. Weekes, and one-half of all my estate, real and personal, of every

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description, I give and bequeath unto my grandchildren, J. Weekes, Mary Ann Weekes and James H. Weekes—same to be equally divided between them; and I do hereby appoint said William J. Weekes guardian, to receive and control the property given to my said grandchildren.

Lastly. I nominate and appoint as my executor, William Weekes, to execute this my will.

In testimony whereof I have hereunto set my hand and have fully executed this my will.

(Signed)

“WILLIAM STALLINGS, [SEAL.]”

Signed, sealed, published and declared by William Stallings as his last will and testament, in the presence of us, who each subscribed the same at the request, and in the presence of the testator and of each other, this 10th May,

(Signed)

“JOSEPH POW,

“T. H. PERSONS,

“MARION BETHUNE.”

The issue upon the caveat came on for trial in the Supreme Court upon appeal from the Court of Ordinary, and resulted in a verdict establishing said paper as the last will and testament of William Stallings, deceased.

Caveators moved for a new trial upon the following grounds, to-wit:

1. Because the Court erred in excluding the paper purporting to be a schedule of the solvent promissory notes and William Stallings, in the hands of said William Weekes, as his agent, principal and interest being included to May 1st, 1857, said paper being offered in evidence by the caveators as tending to show the fraud and inaccuracy of the pretended settlement had between said Weekes, said Stallings and said Stallings on the day of the execution a short time before said pretended will was executed, and as is referred to in said pretended will. Caveators, before offering said paper in evidence, had proved by one William Dennis, that he found said schedule among the papers of

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said William Stallings after his death, and that the paper was in the handwriting of said William J. Weekes.

2d. Because the Court erred in refusing to allow caveators to prove that said William J. Weekes, shortly after the death of said William Stallings, and after said will had been proven by said Weekes in common form, told William T. Dennis, the witness, that he, said Weekes, had procured said Stallings to make and execute said will in order to prevent a bastard child of Nancy Stallings, an idiot daughter of said William Stallings, from inheriting any portion of the estate of said William Stallings, it having been proven that said Nancy Stallings had died in 1866, and before the execution of said will.

3d. Because the Court erred in refusing to allow caveators to prove by the witness, Virginia Dennis, the admission of said William J. Weekes, executor, made after the death of said William Stallings, and after the probate of the will in common form, which admission was stated in the answer of said witness, as follows: "Mr. Weekes told me that he had my father to make a will, in order to protect his (my father's) estate from a third party, viz.: the illegitimate child of Nancy Stallings; that Mr. Forbes asked him if my father had made a will; Mr. Weekes told him 'No!' Mr. Forbes said he ought to make a will in order to protect his estate from the illegitimate child of Nancy Stallings. Mr. Weekes told me that he tried to get Mr. Forbes to go to my father and have him make a will; that Mr. Forbes refused to go, but said that he (Mr. Weekes,) was the proper person to go, whereupon he (Mr. Weekes,) went to my father and made him make a will, in order to prevent this child from having an interest in the estate. Mr. Weekes said that if the will was broken the child of Nancy Stallings would be sure to come in for a share of the estate." This excluded testimony of William T. Dennis, and of Virginia Dennis, rejected as aforesaid, afterwards, and in rebuttal of the evidence of said William J. Weekes, propounder, read to the jury by caveators.

each the said William J. Weekes, the foundation to do so having been previously laid.

4th. Because the Court erred in refusing to allow caveators to prove by Urban A. Leonard, a witness, "that he was the rolling officer of the Government of the Confederate States in the years 1863 and 1864, for the county of Talbot, and that as such officer it was his duty to grant details of overseers on plantations having twenty negro slaves working thereon, and when there was no white man residing thereon competent to manage the same; that said William J. Weekes, the agent of said William Stallings at that time and for those years, made application to him as such officer for the detail of Clement C. Gholson to take charge of said plantation of William Stallings, for said years, on the ground that said Stallings was of unsound mind, and incapable by reason thereof, of managing said plantation and hands, which detail was granted by witness, on the grounds aforesaid; that said grounds were sworn to by said Weekes at and before the granting of said detail." It is admitted that afterwards and during said trial, and in rebuttal of the testimony of William Weekes, said testimony was admitted for the purpose of impeaching said William J. Weekes as a witness.

5th. Because the Court erred in the following ruling: When said William J. Weekes was testifying for propounder in cross-examination, having been shown the said schedule of notes, swore that said paper was a return and schedule of promissory notes, made by him as agent of said William Stallings, in 1857; that the same was correct as therein stated, and after the propounder had closed, said caveators offered said paper as rebutting evidence, but the same was excluded on objection of propounder."

6th. Because the Court erred in the following ruling: Marion Bethune, who wrote the will and was a witness to the same, testified for the propounder, that he, Weekes and Stallings, were together in the house of the latter; that Weekes showed him an account book which he said contained a statement of what he owed Stallings, and showed an account covering

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many pages of the book; that he, the witness, took from the book the added up aggregate of the notes of Stallings and of the pounds of cotton sold by Weekes for Stallings;" to which statement caveators objected, insisting that the books should be procured. The Court overruled the objection, and allowed the witness to testify that he had taken the amounts of the notes and of the pounds of cotton from said book, and had inserted them as thus taken in the will.

7th. Because the Court erred in the following charge to the jury: that "if they believed that William Stallings would not have made the present will unless Weekes had represented to him that if he did not make it the bastard child aforesaid would inherit a share of his estate, then they must find the will to be void;" caveators insisting that the charge ought to be, that "if the jury believed that Stallings would not have made any will unless such representations had been made to him by Weekes, then they must find the will to be void;" which last charge the Court refused to give.

8th. Because the Court erred in refusing to charge the following request: that "if two witnesses swore one way and one witness swore the opposite way, the two were to be believed before the one, if the witnesses were in other respects equal."

The motion for a new trial was overruled by the Court and plaintiffs in error excepted upon each of the grounds taken for a new trial, and assign error thereon.

B. HILL; HENRY L. BENNING; WILLIS & WILLIS, for plaintiffs in error, submitted the following brief: The writings of Weekes to Mr. and Mrs. Dennis were admissible evidence for all purposes. 1st. They were made after the qualification as executor: Code, sec. 2402. 2d. They related to his "conduct or acts" in "a matter relevant to the issue." Code, sec. 2402; 31 Ga. R., 683; *Idem.*, 692. If the evidence for all purposes, they would have been more than as mere impeaching testimony. The admission of the evidence for all purposes would have put the

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the attack on Weekes; its exclusion put the *onus* on him and wife. It is harder to prove a negative than affirmative. The presumption is, that every man is entitled to credit: 19 Ga. R., 287. 3d. Leonard's evidence of Weekes' sayings ought to have been received. 1. Weekes was the agent of Stallings, and uttered them "in the business of his agency," and testator ratified them by accepting Nelson as his overseer: Code, sec. 2173. 2. Though the sayings were uttered before Weekes' qualification as executor, they related to "the conduct or acts" of Weekes himself as testator's agent, and his influence over him—matters not in issue: Code, sec. 2402. 4th. The schedule ought to have been admitted: 25 Ga. R., 577; *Idem.*, 711; 24 Ga. R., 384; 20 *Idem.*, 620; 18 *Idem.*, 709; 30 *Idem.*, 125; *Idem.*, 100; 28 *Idem.*, 73; 27 *Idem.*, 475; 26 *Idem.*, 617. The schedule was, in rebuttal, to impeach Weekes, who swore "he never tried to influence Stallings;" considered him a man of extraordinarily strong ordinary mind." 5th. As to some of the contents (the amount) got before the jury, there is no difference as to the right of having the whole paper admitted: 30 Ga. R., 494. 6th. The book from which the executor took the amounts in the will should have been produced: 32 Ga. R., 141. 7th. The request, as to the credit of witnesses, should have been given in charge: 10 Ga. R., 148. In equity, two witnesses overcome the answer of the defendant: Code, 3050. The canon and civil law, and the law of the continent of Europe, require two witnesses: Greenleaf's Evidence, sec. 260, note 2. This is an ecclesiastical cause.

H. BLANDFORD; E. H. WORRILL, for defendants.

G. MONTGOMERY, Judge.

The first question which I will consider in this case is, whether the sayings of Weekes to Mr. and Mrs. Dennis proposed as evidence in chief? Weekes was the producer of the will and a legatee under it, at least to the

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extent of an acquittance in full for debts he may have incurred to the testator during his long management of his property, which seems to have been continuous from 1854 to 1869, in which last mentioned year the testator died. The facts of this case, so far as applicable to the admissibility of this evidence, are closely analogous to those in *Morris and wife vs. Stokes, administrator*, 21 Georgia, 552, where the same question arose, with the exception that the present case is stronger in favor of the admission of the evidence than that, in this: then the party charged with using undue influence, and whose declarations the caveators proposed to offer in evidence, was only a legatee, not the executor or propounder of the will, and indeed not even a party—except in so far as the propounder may have represented his interests. There, as here, the party admitted that he did procure the will to be made, but it was for the purpose of preventing the inheritance from taking a direction which it could not have taken, and which, in this case certainly Weekes must have known it could not take. The objection to the evidence in 21 Georgia seems to have been upon the ground that the legatee, whose sayings it was proposed to admit, was neither the propounder, nor even a party. Judge Lumpkin says, on page 569, “we are called on, for the first time, to decide this question. It has become a settled rule of this Court that the admissions of the propounder of the will, who is also a legatee for a large amount, may be proven.” Here Weekes is propounder, party and legatee. Whether he takes a large amount or not could be better known if his accounts had been before the Court. The presumption, however, is that he does, as he “made him (the testator) make the will,” in the language of the witness, Mrs. Dennis, and however necessary it may have been, in his opinion, to have a will made for the purpose of disinheriting the bastard issue of a deceased idiot daughter of the testator, surely it was not necessary for that purpose to insert a clause exonerating him from any liability he may have incurred in the management of the testator’s property. If he had felt conscious that

had incurred no liability, the exonerating clause would hardly have been inserted. This, of course, assumes the testimony of Mr. and Mrs. Dennis is true, to-wit: that Weekes made the testator make the will. The declarations of Weekes were excluded as general evidence on the ground (as we learn from the brief of counsel for plaintiff in error) that Weekes had no power to bind the legatees and, therefore, they were immaterial. But this very objection was made to just such evidence in a caveat to a will in *Harvey et al. vs. Anderson*, 12 Georgia, 69, and overruled. Judge WARNER, in delivering the opinion, says: "Were the admissions of Anderson, who was the propounder of the paper offered for probate, the nominated executor therein, and a legatee under the same, competent evidence for the consideration of the jury at the trial? The general rule is, that the declarations of a party to the record, or of one identified in interest with him, are, as against such party, admissible in evidence, and this general rule, admitting the declarations of a party to the record in evidence, applies to all cases where the party has any interest in the suit, whether others are joint parties on the same side with him or not, and howsoever that interest may appear, and whatever may be its relative amount.

"The argument against the admission of this testimony is, that it will have the effect to enable a party to the record, who has a small legacy under the will, by fraud and corruption to make admissions which may destroy other legacies under it ten times greater than his own * * *.

"Although the other legatees, under the paper offered for probate, might have a larger interest under it than the propounder of it, who is a party to the record, seeking to establish it not only for his own benefit but for theirs also—still they are identified in interest with him, and the general rule of evidence is applicable to him and them."

But we think that section 2402 of the Code fairly covers the question under consideration and makes the testimony admissible. Here, then, is "an issue of *devisavit vel non*," in which one of the grounds of caveat is, that the executor

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did, by fraud and deceit, and fraudulent and false representations, procure the testator to make the will—he is both legatee and executor. His admissions are made after qualification. They purport to show that he procured the will to be made by a false representation to the testator, to-wit: that if it was not made his bastard grandchild would inherit.

The important part of the testimony of Mr. Dennis, which was excluded as evidence-in-chief, is as follows: “Weekes then said he went and told him (testator) he ought to make a will to protect his estate against this illegitimate child; and told him if he did not, the child would come in for a part of the estate; and that Stallings acted on his representations and made a will—that he, Weekes, suggested the writer and the witnesses.” This evidence certainly fulfills the remaining requirement of the section—it is relevant to the issue—which is, did Weekes, by false representations, induce the testator to make the will? And I will state here, lest I forget it, the weight of the evidence shows that the testator was, at the time of making his will, and had been for some fifteen years or more prior to his death, of very weak mind, (indeed it is very doubtful whether he was sane,) and entirely under the influence of Weekes. Under such circumstances much less evidence will be sufficient to set aside a will on the ground of undue influence than if the testator were in full possession of all his faculties: 1 Jarman on Wills, 37 to 42. And hence the importance, in such cases, of submitting to the jury evidence like that under consideration. In this connection, it may be well to state that Weekes’ own testimony shows his was the dominant mind in the management of the business of Stallings—when the latter drew a draft upon him for \$3,000 in favor of his other son-in-law, he, Weekes, according to his testimony, refused to pay it, and then persuaded Stallings to acquiesce in the refusal upon the ground that he was getting old and his children might desert him.

We think the evidence was clearly competent. The admission of it, for the purpose of impeaching Weekes,

the caveators the full measure of their rights? As impeaching testimony, it could legitimately have but a negative effect, so far as the issues made by the caveat are concerned. It simply tended to prevent Weekes' evidence from proving the falsity of the charges made by the caveat, and the jury could only consider it for one purpose, to-wit: to ascertain whether Weekes was worthy of credit or not. "The legitimate object of the proposed proof is to discredit the witness:" 2 Brod. and Bing., 313. I have shown, I think, that, as evidence in chief, it was important as tending to establish, affirmatively, the truth of one or more of the charges made by the caveat.

2. We also think the evidence of the Confederate conscripting officer, Leonard, was improperly rejected as evidence in chief. The evidence admitted upon the point of the influence of the executor in having the will made, (the depositions of Ellen Hill,) as well as the evidence on this point, which we hold was improperly rejected as evidence in chief, (the declarations of the executor to Mr. and Mrs. Dennis,) tends to show that the executor did exert influence to have the will made. And this is not contradicted by any one but himself; even one of the subscribing witnesses, who was draftsman of the will, states that "Weekes seemed very anxious about it." In view, then, of the evidence that was admitted, and of that which we hold ought to have been admitted, tending to show the influence of the executor in procuring the will to be made, we think that evidence, showing a knowledge on the part of Weekes of the weak state of the testator's mind, was legitimate for the consideration of the jury as evidence in chief, to have more or less weight, as they may or may not believe that weak state of mind to have continued up to the time of making the will. If, at that time, the testator was so unsound in mind as to be incapable of attending to his own business, which the executor knew, and the latter exerted his influence over him, which was shown to be very great, to induce him to make a will very much in his (the executor's) own favor, it would be difficult to see how the jury could re-

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fuse to set the will aside, if they believed the witnesses who swore to such facts. The tendency of this evidence is to bring the case within the principle laid down in *Martin vs. Teague*, 2 Speers, 268, as quoted by Mr. Jarman, (1 volume, 39,) to-wit: "That undue influence, to avoid a will, must be a control *intentionally* exercised by one mind over the will of another, so as to deprive the other of the free agency of option;" though, perhaps, any influence which *took away the free agency* of the testator would invalidate his will. If the testator is not a *free agent*, the paper can hardly be called his will.

3. It seems to have been conceded that the paper in the handwriting of the executor, and made in 1857, was good evidence in chief to show the amount of the testator's property, at that time in the hands of Weekes, as his agent, and as evidence going to ascertain what amount of interest he took under the will. It was ruled out, however, because not offered before the propounder had closed and the caveators were tendering evidence in rebuttal, the Judge holding that it came too late. The case of *Rolfe vs. Rolfe*, 10 Georgia, 143, and more especially that of *Parker vs. Johnson*, 26 Georgia, 576, would seem to entitle the caveators to introduce the evidence at the time it was offered. It was, therefore, error in the Court to reject it.

Judgment reversed.

J. P. WEST, plaintiff in error, vs. J. A. KENDRICK, defendant in error.

In a suit on a promissory note due to A, a set-off due to the defendant by a partnership of which A is a member, cannot be pleaded either in law or equity unless there be special circumstances also pleaded to avoid the want of mutuality between the two debts.

Set-off. Partnership. Mutuality. Before Judge C. Sumter Superior Court. April Term, 1872.

James P. West filed his bill against Judson A. Kendrick, containing, substantially, the following allegations: That at the October Term, 1871, of the Superior Court of Sumter county, there was pending against complainant a suit in favor of defendant on a note for about \$300; that complainant retained Messrs. Lanier & Anderson, counselors at law, to represent him in said cause, and a plea was filed by said attorneys by virtue of the aforesaid retainer, as follows, to-wit:

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Now comes James P. West and says, on oath, that he is not indebted to plaintiff in manner and form stated in said mes, for the reason that he has placed in the possession of A. D. Kendrick twenty-six bales of cotton, and, from information from others, believes that said J. A. Kendrick and A. D. Kendrick are partners in business, and that there will be a sufficiency, and more, out of the proceeds of said cotton to pay said claim, and places himself upon the country.

(Signed)

J. P. WEST.

LANIER & ANDERSON, Attorneys.

Sworn to and subscribed before me,
this 15th December, 1871.

B. F. BELL, Ordinary.

That at an adjourned term of said Court, the case of J. A. Kendrick vs. complainant, being called, and the name of Lanier & Anderson not having been marked on the docket, judgment was rendered against him; that Mr. Lanier, of the firm of Lanier & Anderson, had been present at said adjourned term, but had obtained leave of absence before said cause was called; that complainant, not supposing that said cause would be called in the absence of his counsel, was not present; that said judgment was rendered without his knowledge or consent; that an execution based on said judgment has been levied upon the property of complainant, which is now advertised for sale; that he expects to prove that the

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plaintiff in said case has enough effects in his hands to pay the note sued on; prayer, that defendant and the sheriff may be enjoined from proceeding with said levy until the further order of the Court; that the common law judgment aforesaid may be set aside; that the writ of subpoena may issue; complainant waives discovery.

The only portion of defendant's answer necessary to an understanding of the decision of the Court is substantially as follows, to-wit: Respondent denies that he has effects in his hands belonging to complainant, or that he is indebted to him in any sum whatever; that said pretended defense is made only for delay; that the allegations in said plea as to a partnership between A. D. Kendrick and defendant are untrue; that respondent and A. D. Kendrick were not partners at the time the note sued on was given, and have not been since; that said note was given in satisfaction of an account for merchandise and goods sold; that some eight months after said note was given, complainant paid to J. A. Ansley, attorney for respondent, the sum of \$170, without making any claim of a defense to said debt, and without making any pretense that it had any connection with the cotton transactions set forth in said plea.

The Court refused the injunction, and plaintiff in error excepted and assigns said decision as error.

LANIER & ANDERSON, for plaintiff in error.

J. A. ANSLEY, represented by B. P. HOLLIS, for defendant.

McCAY, Judge.

Taking the charges in this bill at their fullest value, they do not, in our judgment, make out a case for equitable interference. The suit is in the name of J. A. Kendrick, and the presumption, until it is charged to the contrary, is that the debt is due to him. The debt or cause of action on which the complainant sets up is one which, according to

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wn statement, is not due from J. A. Kendrick, but either from A. D. Kendrick or from a firm composed of J. A. & A. D. Kendrick. Now, even if the answer did not expressly deny the partnership, it is well settled that a debt due by a partnership cannot be set-off against a debt due by a third person to one of the firm. There is no mutuality. The firm and its individual members are different contractors; each, in the eye of the law, a separate person. Nor is the rule different in equity: equity follows the law. True, equity will sometimes, when special equities appear and facts are stated showing why the rules of law will do injustice, see to it that the rule shall bend and justice be done between all the parties. *Prima facie*, this firm, if there be one, can pay its own debts and settle its own controversies, and J. A. Kendrick is not to be prevented from collecting debts due him by controversies between a firm of which he is a member and those to whom he owes.

No wrong has, therefore, been done Mr. West by the judgment. He sets up nothing which, if he had the judgment set aside, he could take advantage of. His plea was not a good one, even if it had been regularly and formally filed. Mr. Anderson's absence did not hurt. Equity will not interfere to stop or set aside a judgment where no good can come of it. The injunction was properly refused. Judgment affirmed.

BOY THOMPSON *et al.*, plaintiffs in error, vs. ANDREW J. KIMBREL *et al.*, defendants in error.

The records of the Court of Ordinary are amendable so as to make them speak the truth, upon the proper steps being taken for that purpose. The fact that the Court had no jurisdiction to grant the order, when it is proposed to amend, cannot affect the motion to amend. If jurisdiction did not exist, parties whose interests may be affected by the judgment can take advantage of the want of jurisdiction as well as before the amendment, whenever and wherever it interferes with their rights.

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2. Upon a motion to amend the records of the Court of Ordinary, the only issue before the Court, is whether the amendment proposed will make the record speak the truth. Whether the original order was legally passed or not is irrelevant and impertinent to the issue. Nor can such order, if illegal, be set aside in this proceeding. The case is not altered where the motion is to rescind an order allowing the amendment.
3. An amendment of its records by the Court of Ordinary, upon an *ex parte* application, cannot affect the rights of any persons not parties to the proceedings. But if such persons afterwards come into Court and move to rescind the order of amendment, and upon hearing all the parties, it appears that the amendment was a proper one to be made, the order granting it should be permitted to stand.

Amendment. Jurisdiction. Court of Ordinary. Practice. Before Judge HARRELL. Miller Superior Court April Term, 1872.

Lucy Thompson and others, the heirs-at-law of Seaborn Thompson, filed their petition, returnable to the April Term, 1871, of the Court of Ordinary of Miller county, setting forth, substantially, the following facts: That at the March Term, 1870, of said Court, upon the application of A. J. Kimbrel *et al.*, said Court granted an order amending an order passed at the December Term, 1858, authorizing Wilson Thompson, as administrator upon the estate of Seaborn Thompson, deceased, to sell the negroes of said estate, by inserting in said order, immediately after the word "negroes," the words "and lands;" that petitioners pray said order may be set aside for the following reasons, to-wit:

1st. Because they had no notice of such application or motion of the Court.

2d. Because said amendment was made twelve years after the granting of the original order.

3d. Because there was no evidence to sustain such amendment.

4th. Because such amendment was procured by fraud.

The same parties filed a second petition, returnable to October Term, 1871, alleging, substantially, as follows:

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at the December Term, 1858, of said Court, the following order was passed, to-wit :

"Whereas, Wilson Thompson, as administrator upon the estate of Seaborn Thompson, deceased, late of said county, having applied to the Court for leave to sell the land and negroes belonging to said estate, and said application having been advertised according to law, and no objection having been filed, it is therefore ordered by the Court that said Wilson Thompson, administrator as aforesaid, proceed to sell, at public outcry, the negroes belonging to the estate of said deceased."

. That the lands belonging to said estate were sold illegally, and without authority of law, on the first Tuesday in January, 1859 ; that on December 29th, 1869, petitioners brought ejectment to recover said lands ; that at the March Term, 1870, of said Court of Ordinary, Andrew J. Kimbrel *et al.*, the defendants in ejectment, procured an order amending said original order so as to include the lands ; that said order was passed without notice to petitioners, improvidently, illegally and without sufficient evidence. Prayer : that said last order may be set aside.

That at the February Term, 1871, said defendants procured an order as follows, to-wit :

"It appearing to the Court that, at the October Term, 1857, of this Court, by Thomas S. Floyd, *ex officio* Ordinary, letters of administration on the estate of Seaborn Thompson were granted to Wilson Thompson ; it further appearing that said letters of administration have been lost, and that the parties interested have used due diligence ; sufficient evidence having been submitted of the above facts, it is therefore ordered by the Court that a copy of said lost original letters be established in lieu of the lost original."

That said order was passed without notice to petitioners, improvidently, illegally and without sufficient evidence ; prayer, that the same may be set aside.

The motions contained in the foregoing petition were, at the February Term, 1872, overruled. The petitioners ap-

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pealed to the Superior Court. Upon the trial in that tribunal, the petitioners requested the Court to charge as follows, to-wit:

"If in an order to sell land there is an error, and no attempt is made by the parties interested to have it corrected until ten years afterwards, it is too late to make such correction, and an order correcting such supposed mistake is void and should be set aside."

The Court refused to give said request in charge, but charged the jury as follows, to-wit:

"That the Court of Ordinary had no power to establish letters of administration, therefore that question did not come before them; the only question for them to try, was whether the Ordinary had properly amended the records of his Court, in reference to the order allowing the administrator to sell the property of the deceased; that depended upon the evidence submitted to them as to the original passage of the order. If they believed, from the evidence, that the order, as originally passed, authorized the administrator to sell the lands, and that, by mistake, inadvertence, or any other cause, unmixed with fraud, the same was improperly recorded, the Ordinary, upon proper proof, had the power to and did properly correct the order. That if the original order, as passed, did not authorize the sale of the lands, the judgment of the Ordinary amending the record was wrong, and they should so find."

Under the decision of the Court an order was taken setting aside the judgment establishing the copy letters of administration. The jury returned a verdict in favor of the defendants.

The evidence is not necessary to an understanding of the decision of the Court, and is therefore not herein set forth.

The petitioners moved for a new trial, upon the following among other grounds, to-wit:

Because the Court refused to charge as requested.

The motion for a new trial was overruled, and plaintiff's error excepted, and assign said ruling as error.

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J. E. BOWER; E. C. BOWER, for plaintiffs in error. Equity will not relieve where party is guilty of laches: Code, § 3070, *et seq.* Amendment of bill refused after five or six years: 9 Ga. R., 143. Judgment had in 1833 cannot be reversed against in 1847: 2 Ga. R., 346. Judgment for five years bars the right: 4 Ga. R., 57. Party must move to amend in the first instance: 1 Ga., 466; 13 Ga., 221. Eleven years after judgment too late to amend: 14 Ga., 592. Cannot amend the record at common law, after Term: 2 Smith's Leading Cases, 586, *et seq.*

J. A. & ISAAC BUSH; HOOD & KIDDOO, for defendants. Records amendable so as to speak the truth: Code, sections 3447, 3448.

MONTGOMERY, Judge.

The order of the Ordinary establishing a copy of the lost records of administration, having been set aside by the Supreme Court, the only question left for this Court to consider was the amendment of the records of the Court of Ordinary, properly allowed? Section 3449, of the Code, gives a large discretion to Courts in the allowing or refusing of amendments of their records. In all cases where such amendments will clearly be in furtherance of justice, the amendments should be allowed. To make the record show what actually took place, and speak the truth, we think is clearly within the rule.

It is argued that the original order which was amended is void, for want of jurisdiction in the Court, and therefore, the amendment should be rescinded. That cannot affect the validity of amendment. Assuming that the Court had no jurisdiction to grant the order to sell the land, the parties complaining can take advantage of it as well after as before amendment, whenever, and wherever it conflicts with their rights: Code, 3536.

The sole question is upon a motion to amend a record made to make it show what actually occurred, will the proposed

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amendment make the record speak the truth? Whether the original order was legally passed or not, cannot, on such a motion, be considered. A motion to rescind an order allowing such an amendment has no wider scope. If it appear that the record, as amended, is false, the order allowing the amendment should be rescinded. The issue is narrowed to this inquiry.

3. When the amendment is allowed upon an *ex parte* application it cannot affect persons not parties to the proceedings. If they choose afterwards to come in and move a rescission of the amendment, they have the right to show, if they can, that the facts do not warrant the amendment; failing to make such a showing, and the amendment appearing a proper one, it should be sustained. This, of course, leaves the question as to the validity of the judgment entirely untouched. If void, it is a nullity; if there is any ground for vacating it, that course is still open: *Walker vs. Scott*, 29 Ga., 397.

Judgment affirmed.

RUST, JOHNSTON & COMPANY, plaintiffs in error, vs. KETCHUM & HARTRIDGE, defendants in error.

Where a plea had been filed to the plaintiffs' action setting up a legal defense thereto, and a trial was had in the absence of one of defendants' counsel who was alone acquainted with all the facts of the defense, which resulted in a verdict for the plaintiffs; on its being made to appear that said counsel had leave of absence, a new trial should have been granted. (R.)

New trial. Leave of absence to counsel. Before Judge STROZIER. Dougherty Superior Court. December Term, 1871.

Ketchum & Hartridge brought complaint against Johnston & Company upon a bill of exchange, dated 14th, 1870, payable on the 1st of November, 1871.

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by Charlton H. Way & Company on Rust, Johnston & Company, and accepted by them, payable to the order of William Schley & Company, for the sum of \$2,305 81. This acceptance was indorsed to Ketchum & Hartridge. Upon the trial the jury found a verdict for the plaintiffs. Rust, Johnston & Company pleaded to the action, 1st, The general issue; 2d, That they were accommodation acceptors, and had been notified by D. P. Hill, the real party at interest, that said acceptance was worthless, and not to pay the same. Plaintiffs in error moved for a new trial upon the following grounds, to-wit:

1st. Because plaintiffs in error intrusted the defense of said cause to D. P. Hill, Esq., attorney at law, who was also a party interested in said suit.

2d. Because said D. P. Hill had leave of absence from the Judge of the Superior Court, and that he absented himself from the Court, and was not present at the trial of said case.

3d. Because the Court erred in refusing the motion for a continuance on the ground of the absence of said Hill, the Court having stated that said Hill had not been granted leave of absence.

The Court ordered defendants in error to show cause at the next term of the Court why said motion should not be granted. A rule was taken by counsel for defendants in error requiring plaintiffs in error to show cause why said motion for a new trial should not be heard during the Court then in session. D. P. Hill, Esq., answered said rule as follows:

"And now comes Daniel P. Hill for answer to the above rule, and says, on oath, that he is informed and believes that Ketchum & Hartridge are not the real owners of the draft issued on, but that William Schley and Charlton Way, the persons in whose favor the draft was originally drawn, are, and always have been, the owners of said draft, and that the suit was brought in the name of Ketchum & Hartridge in order to defeat this deponent in his just and legal defense which he proposed to make.

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"And for further answer this deponent saith, that he has never seen the declaration filed in said case, and his impression always was that the case was returnable to the last term of Dougherty Superior Court, and that he had ample time to prepare for trial before the case could be heard in its regular order; this is the reason no plea has been filed by this deponent in said case.

"For further answer this deponent saith, that he was in attendance on the Superior Court of Dougherty county at its last session for about two weeks, and believing that no business in which he was personally or as attorney interested would be reached at said session of the Court, he obtained leave of absence, which fact is known to the Court.

"For further answer this deponent saith, that it was impossible for any one to have represented the case for him properly unless he had been present at the trial, because no one knew the facts as well as this deponent, which should have been presented on the trial; that deponent expects to be ready for trial at the next term of said Court; that the time is short and would not delay the plaintiffs long in the collection of their money if they be entitled to the same."

The foregoing rule and answer are inserted in order to render clear the rulings of the Court complained of, though the record and bill of exceptions fail to show what disposition was made of the same.

The evidence introduced upon the trial, which was had in the absence of D. P. Hill, Esq., was conflicting as to whether the fertilizer for which the bill of exchange sued on was given was valueless. Two witnesses for the plaintiffs in error testified that the guano was utterly worthless. One witness for the defendants in error testified, "that said fertilizer contained all the materials it purported to contain, that it was good manure, and that if it failed to benefit the crops, it was not from any defect in the fertilizer, but in consequence of unfavorable seasons or bad management on the part of the planter."

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pon the motion for a new trial, the Court passed the following order :

Upon hearing the within motion, and after argument had, ordered that a new trial be refused, upon all the grounds therein, defendant failing to show that he had been injured, or that he would be able, on another trial, possibly, to change the verdict of the jury by any evidence."

Whereupon, plaintiffs in error excepted and assign said error as error.

D. P. HILL, for plaintiffs in error.

W. H. HOBBS, for defendants.

W. H. HOBBS, Chief Justice.

This was a motion for a new trial, on the ground that the case was tried and a verdict rendered against the defendants in the absence of D. P. Hill, who was the sole counsel for the defendants, who had leave of absence from the Court. The Court refused the motion for a new trial, unless the defendants could satisfy the presiding Judge that they had evidence to make out their defense, and thus prevent a similar verdict against them on a second trial; whereupon, the defendants excepted. The defendants had filed their plea to the plaintiff's action, setting up a good legal defense thereto, and might have been able, if their absent counsel had been present, to satisfy the jury, if not the presiding Judge, that the plaintiffs were not entitled to recover, under the evidence contained in the record, on the first trial, and also on the second trial. The bill of exceptions states that the defendants' counsel had leave of absence from the Court, but that the presiding Judge had forgotten it.

In our judgment, the new trial should have been granted: *Ellison vs. Conyers*, 25 Georgia Reports, 158; *Summerlin vs. The Marietta Paper Mill Company*, decided at the term of the Court. In that case, there was no plea filed

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which showed that the defendants had any legal defense to the action, and this Court held that such a plea should be filed and sworn to; otherwise, it did not appear that the defendants had any defense. In this case, the defendants' plea was filed and sworn to, and evidence introduced on the first trial in support of it.

Let the judgment of the Court below be reversed.

THE SOUTHWESTERN RAILROAD COMPANY, plaintiff in error, *vs.* WILLIAM W. CHAPMAN, guardian, defendant in error.

A defendant in a suit at common law cannot, by plea, set up an equitable defense and obtain a decree in his favor, where a Court of chancery would refuse it, on a bill filed by him for the purpose, for want of proper parties. Hence, if a guardian sue a corporation for dividends belonging to his ward, the company cannot, by an equitable plea, shield themselves, as a defense of the fact, that they paid the dividends to one not authorized to receive them, and that the money was applied to the support of the ward by the person receiving it, that person not being a party to the suit.

Equitable defense at law. Parties. Before Judge Cox. Bibb Superior Court. November Term, 1871.

William W. Chapman, as guardian of Tallulah B. Chapman, brought complaint against the Southwestern Railroad Company for the sum of \$767, besides interest, dividends upon stock owned by his said ward in said company. The defendant filed the following plea:

"And now comes the defendant, by its attorneys, Long DeGraffenreid & Irvin, and defends the wrong and injury when, etc., and for plea and answer in this behalf says, that said plaintiff ought not further to have and maintain his action aforesaid against the defendant, because it says that the death of Ambrose Chapman, the father of the said Tallulah B. Chapman, there was only thirty-five shares of stock in

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books of this defendant standing in the name of the Tallulah B.; that after the death of the said Ambrose, nor of the said thirty-five shares to the said Tallulah Chapman, B. F. Chapman, as executor of the said Ambrose drew dividend number twenty-six, amounting to the sum of \$175, on said thirty-five shares of stock, and immediately thereafter invested said sum so paid him by the treasury of the company in two additional shares of stock, for which he paid the sum of \$....., which he, the said B. F. Chapman, executor, caused to be entered in the name of the Tallulah B.; that afterwards, viz.: on the 21st day of July, 1867, the said B. F. Chapman, as executor of the Ambrose Chapman, drew the sum of one hundred and eight dollars, (\$148,) being the amount of dividends upon the thirty-seven shares of stock, two shares of which had been purchased by him, as aforesaid, with the proceeds of this defendant, paid to him for the previous dividend on the thirty-five shares of stock, and the balance over and above that amount paid out of his own funds. And this defendant is informed and believes, and so avers the fact to be, that the said B. F. Chapman, executor, is now, and has been since the commencement of this suit, beyond the jurisdiction of the State of Georgia, in parts unknown to this defendant, dead or insolvent, (?) so that this defendant cannot take the benefit of his testimony, or make him liable for dividends. And this defendant prays that, so far as the two shares of stock are concerned, they having been purchased with the proceeds of the dividends drawn from this defendant by the said B. F. Chapman, executor, that the same may be allowed to this defendant in bar of so much of plaintiff's demand as was the value of said two shares of stock at the time they were so purchased and paid for by the executor with funds drawn by him from this defendant, and that such verdict or decree may be rendered by a jury, under the direction of the Court, in reference thereto, as may accord with the principles of equity and justice.

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"And for further plea and answer in this behalf, as to dividends numbers twenty-eight, twenty-nine and thirty, as set out in plaintiff's declaration, this defendant says that the same were paid by this defendant, in the utmost good faith, to Martha A. Chapman, the mother and natural guardian of the said Tallulah B., (she, at the time, having no other guardian,) and that the said several sums of money so paid by this defendant to the said Martha A. were by her paid out and expended for the support, education and maintenance of the said Tallulah B., and for her sole and exclusive use, and that such payments so made to her by this defendant, and so paid by the said Martha A., were suited to the circumstances and conditions of the said Tallulah B., and rendered absolutely necessary by the peculiar condition of the said Tallulah B. at the time; and without said sums of money so paid by this defendant at the times and in the manner said payments were made, not only would the said Tallulah B. have been deprived of the absolute necessities of life, but also her education would have been neglected at the most important period of her life; wherefore, in view of the facts, secondly, above pleaded, this defendant prays that such a verdict may be rendered in said case as will be in accordance with the principles of equity and justice, and fully protect this defendant in the premises. All of which this defendant is ready to verify, and puts itself upon the country."

Evidence was introduced in support of the above plea. The defendant requested the Court to charge the jury, "that if it appears, from the evidence, that Tallulah B. Chapman got the benefit of such dividends as were drawn by the mother from the Southwestern Railroad Company, her present guardian is not entitled to compel the railroad company to pay those dividends a second time; or if the estate of Tallulah B. Chapman received the benefit of those dividends and they were used partly for her education, maintenance and support, and partly for repairs in keeping up her home, so that the whole were thus expended by the mother, the present guardian was not entitled to recover them again."

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The Court charged that the above request was law, but inapplicable to the case, to which defendant excepted.

The Court was further requested to charge the jury as follows: "The jury may, under the evidence in this case, so mould their verdict as to do full justice to the parties, and in the same manner as a decree in equity, just as if this were proceeding in equity instead of an action at law."

The Court charged this last request, but defendant excepts on the ground that its force and effect was destroyed by refusal to charge the request immediately preceding.

The Court further charged the jury as follows: "That it appears, from the evidence, that the railroad company had paid to Mrs. M. A. Chapman, the mother, dividends on stock which was the property of Tallulah B. Chapman, and that Mrs. M. A. Chapman was not the guardian of Tallulah B., and had not given bond, as required by law, such payment was illegal, and the company is liable unless it appears that she invested such dividends in property for the benefit of Tallulah B., which property had subsequently been accepted by her guardian in lieu of said dividends."

To which charge defendant excepted.

The jury returned the following verdict:

"We, the jury, find for the plaintiff \$767, the amount of dividends paid to the administrator of Ambrose Chapman, the Southwestern Railroad Company, except \$180 paid for the two shares of stock purchased by the administrator for Tallulah Chapman, with interest from the commencement of suit for the same."

Plaintiff in error assigns the refusal of the Court to charge, on the charge as given as error.

W. K. DeGRAFFENREID; LYON & IRVIN, for plaintiff in error.

FOR, HALL & POE, for defendant.

MONTGOMERY, Judge.

I am not satisfied with the decision of the Court as rendered in this case—that the Southwestern Railroad was responsible to the guardian of the minor for the amount of the dividends sued for, and for which the jury found a verdict, is unquestionable. But the plea of the defendant was substantially a plea of set-off for necessities furnished the infant, and evidence was introduced in support of the plea. No objection was made to the plea that it did not set forth with sufficient distinctness the items of the set-off. If such objection had been made, the plea might have been amended, if necessary. Under this view I think the defendant was entitled to the charge asked, which the Court said was law but not applicable to the case, and that the practice in equity of making all persons interested parties has nothing to do with the case. The Court, as I now think, was misled by looking to the verbiage rather than the substance of the plea. If I am correct, no other party was necessary or proper to be made, but the case should have gone to the jury with instructions to find for the plaintiff whatever amount of dividends he had proved was paid to the executor of Ambrose Chapman unaccounted for, and to the mother and natural guardian of the ward, less the amount of the defendant's money (if any) shown to have been expended in necessities for the infant at a time when there was no other source from which to supply her needs. I agree fully with the Chief Justice that both Courts of law and equity are bound by the 1794th section of the Code. But because the railroad violated the provisions of that section, does that estop it from recovering by way of set-off, money paid, laid out, and expended for necessities to the infant? I think not. I regret this, what I now conceive to be, mistake of the Court, but less than I otherwise would do from the fact that the railroad has since filed a bill in accordance with the intention of the Court, which will secure its rights if, in fact, of its money has been expended for necessities for the infant.

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f the defendant in error. It is not surprising that, in the
ot haste with which we are compelled to throw off the de-
sions of this Court, owing to the heavy pressure of busi-
ees upon it, some of us should afterward be dissatisfied with
s rulings. These are my individual views. The judgment
f the Court below stands affirmed as set forth in the head
ote.

Judgment affirmed.

WARNER, Chief Justice, concurring.

The 1794th section of the Code declares that the natural
uardian cannot demand or receive the property of the child
ntil a guardian's bond is filed and accepted by the Court of
rdinary of the county; and this applies as well to the in-
ome of the property as to the *corpus* thereof. It is the
eclared public policy of the State, for the protection of the
ghts of minor children, and is as imperative and binding
Courts of equity as in Courts of law. Equity follows the
w in such cases, and cannot override and control it; that
to say, a Court of equity is as much bound by the pro-
visions of a positive statute as a Court of law.

CHARLES G. FARMER, plaintiff in error, vs. JOHN B. PERRY,
defendant in error.

Judgment will not be set aside for absence of defendant's counsel by
leave of Court, and an announcement by the Court that none of the
counsel's cases will be tried, except by consent, where it does not dis-
tinctly appear that such counsel was regularly retained in the case, he
himself not being able to swear to it, and it does appear that the part-
ner of the counsel, who was such at the time of the alleged retainer,
is in Court and states that he knows of no defense, and it further ap-
pears that there is no counsel of record, that no plea is filed, and that
there is a judgment by default which has not been opened.

Attorney and client. Leave of absence. Judgment by
default. Before Judge HARRELL. Terrell Superior Court.
November Adjourned Term, 1871.

Farmer vs. Perry.

John B. Perry brought complaint against B. F. Todd and J. H. Pickett, principals, and Charles G. Farmer, security, to the May Term, 1871, of Terrell Superior Court, on a promissory note dated June 15th, 1870, due the first of November next thereafter, for the sum of \$576 78. On December 4th, 1871, the Court rendered a judgment for the plaintiff, there having been no issuable defense filed under oath. Subsequently, the defendant, Farmer, moved to set said judgment aside upon the following grounds, to-wit:

1st. Because he has a legal defense to said note in part, to-wit: \$147 92, said sum being for usury.

2d. Because he had spoken to L. C. Hoyle, Esq., an attorney of said Court, to represent him; that said Hoyle was absent, by leave, during the term at which the judgment was rendered; that he was present in Court, and heard the announcement that none of said Hoyle's cases would be tried, except by consent, which caused defendant to give no further attention to the case; that said Hoyle was the only attorney upon whom he relied.

3d. Because, in December, 1870, said plaintiff caused an execution to issue for the amount of said note with interest, against the crop and stock of defendant, predicated upon affidavit made by said plaintiff under the statute of this State, authorizing the foreclosure of liens for provisions, etc., and an affidavit of illegality was filed thereto, which was pending at the November Term, 1871, and said proceeding was not dismissed until plaintiff was ready to take his judgment on said note, and did so, with his judgment previously obtained still open, as it is to this date.

4th. Because said case was not placed on the calendar cases for trial at the November Term, 1871, or at least if so was the case it does not so appear.

The grounds of the aforesaid motion were sworn to by defendant and were supported by affidavits of L. C. Hoyle, B. F. Todd and R. F. Simmons.

Hoyle swore that he was a practicing attorney in Terrell

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rior Court; that he was employed by Charles G. Farmer, defend the foreclosure of a provision lien, and filed his avit of illegality for him; that said case was dismissed plaintiff at November Term, 1871; that he cannot swear tively that he was employed to defend the suit comed at common law on the note, but the relationship between Farmer and himself was such that he would have represented the case, had he been in Court; that when employed defend the proceeding by lien, affiant and Wooten were ers under the firm name of Wooten & Hoyle; that he not remember to have mentioned the matter to Wooten, as he any recollection of having filed any plea.

ie affidavit of Todd simply proves the usury.

ie affidavit of Simmons shows that leave of absence had granted to L. C. Hoyle and so announced by the Court; if Hoyle's name had been marked on the docket to the he would have represented him.

ie motion was overruled by the Court and plaintiff in excepted, and now assigns said ruling as error.

ie Court attached to the bill of exceptions a note to the wing effect: "F. M. Harper, the counsel for plaintiff, l in his place, that the case referred to by defendant as ig been defended by illegality, was regularly called in der during the first week of Court, and passed on ac: of Colonel C. B. Wooten's absence at Albany, the name 'ooten & Hoyle being marked to said case for defend- that after Wooten returned it was again called, and on a of plaintiff's counsel was stricken from the docket; Colonel Wooten, when the common law case was called, l that he knew of no defense; that there was no plea to it, and no counsel marked thereto; that judgment fault had been taken at the appearance term and the lt had never been opened; all of which facts were in nowledge of the Court, and that said case upon which idgment was founded, was regularly called in its order the calender. The calender or Judge's docket shows e counsel was marked for defendant. The Court, upon

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this state of facts, especially as Mr. Hoyle was not able to state that he was employed in the case, the defendant not swearing that he was, overruled the motion and refused to set the judgment aside."

HOYLE & SIMMONS, for plaintiff in error. Leave of absence to counsel dispenses with the discharge of every professional duty: 25 Ga. R., 158; 36 *Id.* 54.

F. M. HARPER; CLARK & GOSS, for defendant.

MONTGOMERY, Judge.

The brief of plaintiff in error insists upon the first two only of the four grounds of alleged error set forth in the record.

As to the first, it is only necessary to say that however good a defense a party may have to a suit, it is worth nothing if by his own *laches* he permits the proper time for pleading it to pass without availing himself of it.

1. A continuance will be granted on account of the absence of leading counsel by leave of Court: 36 *Ga.* 54; But when a case has gone to judgment and a new trial is moved for on the above ground, it must distinctly appear that the absent counsel was retained, and not merely "spoken to," by the client, or by his authority express or implied. If the counsel is unable to swear that he was retained in the case, and his partner, who was such, at the time of the alleged retainer was present when the case was called and stated that he knew of no defense, and it also appears that there is no counsel of record, no plea filed, a judgment by default unopened, it would be but holding out a premium to negligence and a great injustice to the adverse litigant, to grant a new trial under such circumstances. The affidavit of Mr. Simmons shows that he would have attended to the case had Mr. Hoyle's name been marked on the docket for defendant. It is hardly probable that Mr. Hoyle would have failed to have his name entered for defendant at the first term, or before that and the term at which the case was disposed of, had

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considered himself retained. At all events, upon the assumption that he was retained, here was negligence for which the opposite party cannot be held responsible, and should not be made to suffer, especially when taken in connection with the other circumstances of the case.

Judgment affirmed.

GABRIEL B. ROBERTS, plaintiff in error, vs. THE ADMINISTRATORS OF WASHINGTON B. OLIVER, deceased, defendants in error.

Here a rule nisi to foreclose a mortgage, alleged that the mortgage was executed by a partnership to a parcel of land, and that the proceedings were against one as surviving partner, the other being dead, and the surviving partner filed a plea, setting forth that the land included in the mortgage was not partnership property, though owned by the partners as tenants in common, and the plea was demurred to and the demurrer sustained :

And, That as there was no denial that the mortgage to the property was made by the partners, as such, and as, if this were so, it would estop the parties from denying title in the partnership, the plea was properly overruled.

Foreclosure of mortgage. Partnership. Survivor. Before Judge COLE. Bibb Superior Court. October Adjourned Term, 1871.

The petition of the administrators of Washington B. Oliver for a rule nisi against Gabriel B. Roberts, as surviving partner, requiring him to show cause why a certain mortgage could not be foreclosed, set forth the following facts : On May 15th, 1856, Richard S. Freeman and Gabriel B. Roberts, partners, using the firm name of Freeman & Roberts, made and delivered to said Oliver four promissory notes, whereby they promised, by each of said notes, one day after the date thereof, to pay to the order of said Oliver \$1,000, with interest, and for the better securing the payment of said

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notes said Freeman & Roberts executed and delivered to said Oliver their deed of mortgage conveying to him part of city lot of land number six, in square thirty-nine, in the city of Macon, conditioned to be void upon the payment of said notes. The rule *nisi* issued as prayed for and the defendant filed the following answer :

"And now comes G. B. Roberts, the defendant, and says that the movants are not entitled to have their rule absolute for the foreclosure of said mortgage as prayed, for the reason that in contemplation of law he is not the surviving partner of Richard S. Freeman in said mortgaged property, and that the movants have no right to institute this proceeding to foreclose said mortgage upon said property, and against him as the surviving partner of Freeman & Roberts.

"The said Freeman & Roberts were partners in mercantile business, (which business was discontinued some twelve years since,) but in such real estate as they purchased jointly they were tenants in common and not partners.

"W. H. Starke, of said county, has been appointed administrator upon the estate of said Freeman ; that he can alone represent the interest of the estate of said Freeman in this litigation, that he has not been made a party, and that twelve months have not elapsed since the date of the letters of administration upon said estate to the said Starke. Upon the foregoing grounds the said G. B. Roberts prays that said application and rule to foreclose said mortgage against said property and against said Roberts as surviving partner be dismissed."

The plaintiffs demurred to said answer. The demurrer was sustained by the Court, whereupon plaintiff in error excepted, and assigns said ruling as error.

A. O. BACON, for plaintiff in error.

POE, HALL & POE, for defendants.

McCAY, Judge.

This case turns upon the same principle as the case of Allen . Lathrop, decided at this Term from the same Circuit. If is mortgage was made by the copartnership as such, the rtnership and its survivor are estopped from denying that e property mortgaged belonged to the firm. A man can- t contradict the assertion of his own deed. The partner- ip, having by its deed created a lien on this land as the operty of the partnership, is not allowed to come into urt, and in the face of this solemn assertion of title in elf, deny that it had title, and what the partnership could t do. Roberts, who is a party, as survivor, is also incap- a of doing this since he succeeds to its rights and is bound its acts. The only question is, does the deed convey this operty or create this lien upon the property as partnership operty? The mortgage does not appear in the record. But a petition for foreclosure declares that the firm mortgaged : property. This the plea does not deny. It says it is ie that the property did not belong to the firm. But, as have seen, the survivor is estopped from doing this, if i property was mortgaged *as firm* property. Parties and vies are estopped. He is a party, so far as his own inter- s are concerned, and as the representative of the firm he is f only a privy, but more. We think, therefore, this plea s properly stricken out. It fails to deny the fact stated in i petition that the property was mortgaged as partnership perty. Unless the plea does this it is not allowable; it is the teeth of the defendant's own acknowledged deed. Judgment affirmed.

McRory vs. Sellars.

RICHARD ROE, casual ejector, and STERLING J. McRORY, tenant in possession, plaintiffs in error, vs. JOHN DOE, ex demise of STEPHEN A. SELLARS, administrator *de bonis non*, of RICHARD SELLARS, defendant in error.

1. The record book of the Court of Ordinary, containing the original order granting letters of administration to the plaintiff, is admissible without accounting for the non-production of the original letters. (R.)
2. The fact that exceptions were filed to an award which was made the judgment of the Court, does not render it inadmissible, the exceptions having been withdrawn. (R.)

Secondary evidence. Disclaimer. Award. Before Judge CLARK. Schley Superior Court. April Term, 1872.

Stephen A. Sellars, as administrator *de bonis non* upon the estate of Richard Sellars, deceased, brought ejectment against Sterling J. McRory for lot of land number twenty-six, in the thirtieth district of Schley county. At the April Term, 1871, of Schley Superior Court the defendant filed a disclaimer, which was subsequently withdrawn.

Upon the trial plaintiff tendered in evidence the letters of administration issued to him upon the estate of Richard Sellars, as contained in a book kept in the Ordinary's office of Schley county, entitled "letters of administration." Defendant objected, insisting that the plaintiff should either produce the original letters, or account for their non-production. The objection was overruled, and defendant excepted.

The plaintiff, Stephen A. Sellars, was sworn, and testified that his intestate had possession of the land sued for as far back as the year 1835, and continued in possession until his death in 1858. Plaintiff closed.

Defendant introduced a deed from Jacob Sellars, administrator of Richard Sellars, deceased, to Hiram Tison, dated January 3d, 1860, conveying the land in controversy.

Defendant closed. Plaintiff in rebuttal tendered in evidence a submission to arbitration, an award and an order directing the same to be entered on the minutes of the Court.

April Term, 1870. The submission was as to the matter controversy in this suit. The only portion of the award, material to an understanding of this case, was as follows: That the deed now held by said Hiram Tison to said lot from the administrator of Richard Sellars, deceased, be surrendered up and canceled, and that the title to said lot of land be revested in the estate of said Richard Sellars, deceased, and subject to administration by said administrator *de bonis* *mortis* of said Sellars." The award was dated September 8th, 1869. Defendant objected to this evidence; the objection was overruled and defendant excepted.

Plaintiff closed. Defendant introduced exceptions to the aforesaid award, filed in office at the April Term, 1870. Also, deed from Hiram Tison to himself, covering the land dispute, dated the 17th of August, 1869.

Defendant closed. Plaintiff introduced Hiram Tison as a witness, who testified that the deed from him to defendant was not executed and delivered on the day it bore date, but was delivered only a short time prior to the October Term, 1869, of the Court; that he had withdrawn his exceptions to the award; that defendant knew of the award at the time; that defendant was in possession at the commencement of the trial.

Plaintiff closed. The bill of exceptions fails to show when the exceptions to the award were withdrawn, but states that defendant "at the commencement of the trial, and upon the withdrawal of said exceptions as aforesaid, asked leave of the court to reinstate said disclaimer, upon the ground that he withdrew it under the belief that he could avail himself of the exceptions to said award, on the trial of the case." Defendant was allowed to reinstate disclaimer.

The Court instructed the jury that the award divested Hiram Tison of the title to the land, and vested the same in plaintiff, and that plaintiff was entitled to recover possession of the premises and costs of suit. To which charge defendant excepted, and assigns the same, together with the rulings of the Court above set forth, as error.

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HAWKINS & GUERRY ; C. T. GOODE, represented by Z. D. HARRISON, Esq. ; E. H. WORRILL ; CLARK & Goss, for plaintiff in error.

B. HILL ; M. H. BLANDFORD, for defendant.

WARNER, Chief Justice.

This was an action of ejectment brought by the plaintiff against the defendant to recover the possession of a lot of land in the county of Schley. The plaintiff offered in evidence the record book of the Court of Ordinary, containing the original order granting letters of administration to the plaintiff, which was objected to, and the objection overruled by the Court. The plaintiff offered in evidence an award of arbitrators, set forth in the record, which was objected to, and the objection was overruled. The award had been made the judgment of the Superior Court. The fact that exceptions to the award had been filed and withdrawn did not make it any the less the judgment of the Court. The record containing the original order granting the letters of administration was properly admitted in evidence. The defendant disclaimed title to the land, and, under the charge of the Court, the jury found a verdict for the plaintiff. We find no error in this record.

Let the judgment of the Court below be affirmed.

ELEN WEST *et al.*, plaintiffs in error, *vs.* JOHN RODAHAN *et al.*, defendants in error.

here a bill is filed by the heirs of a deceased person for an account, and to recover possession of land from which their ancestor was ousted by fraud on the part of some of the defendants, and notice of the fraud by the others, before they acquired possession, and alleges facts which, if true, sustain the charge of fraud, and further alleges that, although the defendants have been in possession, under color of title, for more than seven years, yet that such possession originated in the fraud charged, and that such fraud deterred their ancestor, who was an illiterate man, from his action during his life, and that he died in 1868 in ignorance of the fraud, it is not demurrable for want of equity, nor on the ground that it shows on its face that the defendants have a complete prescriptive title to the land.

Statute of limitations. Fraud. Before Judge GREEN.
Jury Superior Court. April Term, 1872.

Helen West, the widow of James West, deceased, Mary Swan and her husband, Matilda West, West, and Elizabeth West, his daughters, filed their bill against John Rodahan, George T. Connell, Allen H. Turner, James W. Undergriff, Charles B. Smith, and Lewis M. Tye, containing substantially the following averments: That Elizabeth West, West, and Matilda West are minors, of the ages of seven, five and four years, respectively; that said James West, on the day of, 185.., purchased of John Rodahan certain real estate in the town of McDonough for the sum of \$1,500, and a stock of groceries for the value of \$550; that said West paid to said defendant, in part, the sum of \$550, and gave his note, due on December 25th thereafter, for the sum of \$1,500, secured by mortgage on said real estate; that before said note became due said West transferred to said defendant a note on Allen Cleveland for \$175, for which amount said Rodahan was to give a credit on the note first aforesaid; that he paid to said defendant, in cash and personalty, the sum of \$500, for which amount said Rodahan was to allow a credit on the note; that James West took immediate possession under

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a warranty, fee simple, deed; that when said note became due, said defendant demanded payment of the same in full, and said West not being able to comply, he demanded immediate possession of said real estate, representing that, under the terms of said mortgage, said West had forfeited all interest in said property; that said West, being an illiterate man and not versed in the law, delivered to said defendant possession of said premises and sold him the stock of goods he had on hand for the sum of \$400, Rodahan taking possession of his books of account; that said West, believing that he had been defrauded, filed his bill praying for the rescission of the contract, and that the deed made by Rodahan to him and by him to Rodahan, be set aside, etc.; that doubting his success in said proceeding in equity, said James West commenced his action of ejectment to the Term 185. of the Superior Court of Henry county; that at the April Term, 1858, said defendant and West compromised the matters in dispute between them upon the following terms, which were reduced to writing: "Said Rodahan was to account to West for payments received and collections made on the grocery books aforesaid, and also for the rent of said premises; West was to dismiss his bill and his action of ejectment and allow said Rodahan to foreclose his mortgage and to sell said premises for the discharge of said debt under the mortgage *fi. fa.*; that said West complied with his part of the agreement, but said Rodahan continued in possession of said premises without complying with his portion of said contract or any part thereof, fraudulently pretending that he would comply at some time in the future; that in the latter part of 1858 said defendant, combining and colluding with Allen H. Turner, conveyed to him the mortgage aforesaid and Turner went into possession of said premises; that said defendants, Turner and Rodahan, combining and confederating with the defendant, George T. Connell, procured said Connell to execute a deed to said premises to said Turner, though they knew that said Connell never had any authority for the same; that said defendants then informed said West

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1 said agreement of compromise and the consequent dis-
missal of his legal proceedings, he had lost all right or equity
1 said premises and must now submit; that said West being
ignorant and poor, believed the statements of said defendants,
whom he knew, from their much litigation, to be skilled in
the law; that said defendant, Turner, pretended to sell one
of the houses on said premises to the defendant, Charles B.
Smith, who transferred the same to the defendant, Lewis M.
Smye, who is still in possession; that the defendant, Turner,
pretended to sell said other house, in the year 1868, to the
defendant, James W. Vandergriff, who is still in possession;
that said West died in ignorance of his rights in the year
1868; that all of said defendants had full notice that the
title to said property was in said James West; that although
said defendants have been in possession of said premises for
more than seven years under a claim of right, yet their pos-
session was undisturbed because said West was deceived by
their representations, and that while the rights of complain-
ants may be barred by the strict rules of the common law,
they, nevertheless, available in equity; that the rents of said
premises have been worth, annually, the sum of \$200; that
complainants waive discovery; prayer, that all of the afore-
said deeds, except that from the defendant, Rodahan, to the
said James West, be delivered up to be canceled; that the
feoffment last aforesaid be set up and established; that
possession of said premises be delivered to complainants;
that complainants may recover rents and the interest thereon;
that a guardian *ad litem* be appointed for the minor com-
plainants; that the writ of subpoena may issue.

The bill was returnable to the April Term, 1870, of Henry
Superior Court, having been filed in office on November 11th,

At the October Term, 1870, of said Court, complainants
amended their bill, substantially, as follows: That if the de-
fendants have acquired, by their long and continued occu-
pation of said land, a title thereto by prescription, as against
the heirs of said James West, yet they acquired no such title.

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as against the right of complainant, Helen West, the widow of said James West, deceased, to dower. Prayer, that if complainants are barred, as heirs-at-law of said West, that dower may be decreed to complainant, Helen West, as his widow.

The defendants demurred to said bill. The demurrer was sustained by the Court upon the ground that the cause of action of complainants, as set forth in said bill, was barred by the statute of limitations. To which ruling complainants excepted, and now assign the same as error.

S. C. McDANIEL, for plaintiffs in error.

DOYAL & NUNNALLY, for defendants.

MONTGOMERY, Judge.

The bill in this case is saturated with specific charges of fraud on the part of the defendants. If true, as we must assume on demurrer, certainly there is no want of equity in the bill. The defendants can take nothing from the statement in the bill that they have been in possession for more than seven years, under adverse claim of title, the bill charging, as it does, that such adverse possession originated in fraud, of which the defendants were fully apprised at the time they went into possession: Code, section 2641. What the defendants may set up, by way of answer, we do not know. Certainly the bill is not demurrable for want of equity, or because it shows on its face a complete prescriptive title, by the statute of limitations in the defendants.

Judgment reversed.

THE SOUTHWESTERN RAILROAD COMPANY, plaintiff in error, *vs.* WILLIAM W. CHAPMAN, guardian, *et al.*, defendants in error.

Section 1794 of the Code, declaring that a natural guardian is not entitled to demand or receive the property of a minor, until he or she has given bond to the Ordinary, does not make such receipt illegal in such a sense, as that the person paying it cannot recover it back, or show that it has, in fact, been accounted for by the natural guardian to the ward, or applied to the benefit of the ward.

Here a bill in equity was filed by a railroad company, alleging that it had paid the dividends on certain shares of stock belonging to a minor to the mother of the minor, the father being dead; that the mother had appropriated the money paid to the necessary uses and expenses of the minor; that a guardian of the minor had been subsequently appointed who had brought suit against the railroad, and obtained a judgment for the dividends; that on the trial of the suit this defense of the company had been disallowed by the Court on the ground that it was not a good defense at law, since the mother was not a party to the suit; that final judgment had given a lien against the company in favor of the guardian, who was about to proceed to collect the money by execution; that the mother was insolvent, and that no accounting had been had between the guardian and the mother, for the expenditures for which this money was used. The bill prayed that the judgment at law might be enjoined, until an account should be taken, as to the amount due, from the ward's estate to the mother, for said expenditures, and that the amount, when found, should be applied to the judgment.

Held, That the Judge ought to have granted the injunction.

Equity. Injunction. Guardian and ward. Before Judge JOL. Bibb county. At Chambers. September 11th, 1872.

The Southwestern Railroad Company filed its bill against William W. Chapman, as guardian of Tallulah B. Chapman and Martha A. Chapman, containing, substantially, the following allegations: That said Tallulah B. Chapman is the owner of thirty-five shares of the capital stock of complainant; that after the death of her father, Ambrose Chapman, in the year 1866, and before any guardian was appointed for her person and property, the treasurer of complainant, without authority, paid a dividend on said stock amounting to \$323 to Brad. Chapman, as the executor of the last will

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and testament of said Ambrose Chapman, deceased, \$180, of which said executor invested in two shares of the capital stock of complainant, and had the usual certificate issued in the name of the said Tallulah B.; that afterwards and before the appointment of any legal guardian for the said Tallulah B., complainant's said treasurer paid to Martha A. Chapman, the mother of the said Tallulah B., three other dividends upon said thirty-seven shares of stock, amounting in the aggregate to \$444; that at the time the said last mentioned dividends were respectively paid, the said Brad. Chapman had been removed from the executorship of said estate, and the said Martha A. Chapman had been appointed administratrix with the will annexed, and had in her hands the unadministered estate belonging almost entirely under said will to the said Tallulah B.; that in the administration of said estate the said Martha A., charged herself with said dividends, and paid them out in the support, education and maintenance of the said Tallulah B., in the repair of property belonging under said will, to said Tallulah B., in taxes on the same, and in the expenses of administration; that said Tallulah B., in this way, received the benefit of said dividends so paid as aforesaid; that after the said dividends had been paid to the said Martha A., and after she had applied the same to the exclusive use and benefit of her said daughter, the defendant, William W. Chapman, obtained letters of guardianship for the person and property of the said Tallulah B., she being still an infant, and commenced suit against complainant for the dividends so paid as aforesaid to said Brad. F. Chapman, executor, and to the said Martha A. Chapman; that complainant pleaded to said suit the facts heretofore set forth; that the plea was allowed as far as the \$180 invested by said executor in the stock of complainant was concerned, and overruled as to the remainder of said dividends, the Superior and Supreme Courts holding that said suit being purely an action at law to which said Martha A. Chapman was no party, the equitable defense of complainant could not be allowed, and judgment was rendered.

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complainant for the amount of the aforesaid dividends less 80; that complainant admits its liability for the amount paid by said executor less the \$180 aforesaid, which is 43, and is ready and willing to pay the same with the legal interest thereon; that the defendant, Martha A. Chapman, is solvent, and declines to refund to complainant said dividends so paid to her as aforesaid, for the sole reason, that if she were compelled to refund to complainant the amount of the aforesaid dividends, she would be entitled to recover the same from the estate of the said Tallulah B. Prayer, it, in order that there may be an account had between the defendant, W. W. Chapman, guardian, and the defendant, Martha A. Chapman, as to the amount of said dividends applied to the use and benefit of the said Tallulah B., and complainant allowed the benefit thereof as against the judgment in favor of said defendant, William W. Chapman, as guardian, the writ of injunction may issue restraining the said defendant, Chapman, as guardian, from proceeding with the execution based upon said judgment until the further order of Court; that the writ of subpoena may issue.

The Chancellor refused the injunction, and complainant excepted and assigns said ruling as error.

LYON & IRVIN, for plaintiff in error.

POE, HALL & POE, for defendants. 1st. Natural guardian cannot receive property of child until bond is filed: *Id.*, sec. 1794. 2d. Equity will not afford relief to a party who has violated a statute: 1st Story's Eq. Jur. secs. 298-303; 3 Ga. R., 183; 5th, 413; 9th, 114; 11th, 245; Lord Bacon's General Orders, No. 6; 2 Camp. Lives of Chancellors, 3; 2d Bacon's Ab., p. 139.

MCCAY, Judge.

Our Code, section 1794, provides "that the father of a child, and if the father be dead, the mother is the natural guardian of the minor;" and it then adds, "the natural

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guardian cannot demand or receive the estate of the minor until he or she gives bond, approved by and to the court. Without doubt this is a wise and proper provision, and, without doubt, neither the father or mother of a minor can legally bind the ward by a receipt of the property of the ward; the bond be given as required by law. A receipt for the ward's money is, no doubt, by virtue of this provision, illegal—that is, without authority—a payment to the guardian is no legal payment, and the person paying is not bound. All this is true, and in this sense such payment and receipt is illegal. It is just as illegal to pay money to a minor to his natural guardian who has not given bond, or to pay it to any other unauthorized person. The payment in either case, is without authority, not sanctioned or authorized by law. But it seems to me absurd to say that it is illegal in the sense that it is corrupt—contrary to public policy—a violation of law, so that the Courts will refuse to interfere between the parties engaged in the transaction under the maxim: “*In pari delicto, potior est conditio defendentis*.” It is, it is true, a well-settled rule that parties engaged in violating the law cannot call upon the Courts to aid them, and neither gets the advantage of the other. Money paid to a felon to pound a felony cannot be recovered back; and, generally, a debt arising under any agreement which is, by law, authorized or contrary to good morals, or against the declared public policy of the State, cannot be recovered. These are familiar rules, and we have nothing to say against their existence or their wisdom. But it is, in our judgment, an utter perversion of the rules we have referred to, to apply them to a case as this.

The payment of this money to the mother was in no sense corrupt or a crime, or contrary to good morals, or against public policy. It was simply unauthorized; the payment was no protection to the company. The mother had no authority to receive it. It stands precisely as if it had been paid to any other unauthorized person, and that is all. The law does not *prohibit* such a payment; it simply declares

authorized. In announcing that the parent is the natural guardian, it qualifies his powers as a guardian by withholding from him the right to take possession of the minor's estate. If he does get possession, it seems to me the very height of absurdity to say that the person who lets him have is guilty of such a violation of the law as that he has no *locus* in a Court of justice; that he comes in as a law-breaker, and cannot be listened to. The strongest possible illustration of the wrong of such an application of this law is in this case. Here it appears, by the bill, that this payment was made in good faith, without any intent to do wrong, but with a purpose of honestly and fairly complying with the duty to the company. And yet it is asserted that the Courts of justice, in holy horror of conniving at a violation of law, will refuse to compel the mother, who has got this money without authority, to pay it back. If the rule has any application to this case, it must go as far as this; for if the money was *illegally* paid, in the sense of the rule which is relied on, it can no more be recovered back from Mrs. Chapman than it can in the method now insisted on by the plaintiff in error. The truth is, the present proceeding is only a proceeding to get the money back from Mrs. Chapman, and equity is resorted to, not because a Court of law would refuse to interfere against her, but because she is insolvent and has put the money to such use as that it is a proper charge in her favor against the estate of the minor. Having a right of action at law against Mrs. Chapman, and she having a right to compel the minor to account to her, the company has to be subrogated to her rights against the minor, on the ground that, as she is insolvent, and as, in truth, the money was used for the necessities of the ward came from the company, it is only right that the ward should not be allowed again to get the money. It is inequitable that this minor should twice get this money: once, through the hands of another, and now by a judgment. Minors are, it is true, favorites of the Courts, but, as it seems to me, even for these favorites, the Courts will not do such gross injustice.

Judgment reversed.

MONTGOMERY, Judge, concurred, and referred to his opinion in the case of the Southwestern Railroad Company vs. Chapman, guardian, on page 542.

WARNER, Chief Justice, dissenting.

This was a bill filed by the complainant against the defendants to enjoin the collection of a judgment obtained for certain described dividends on railroad stock, which was the property of the defendant's infant ward, and which, it is alleged, was paid by the complainant to the mother and natural guardian of the infant, and which had been used and appropriated for the benefit of the ward. There is no sufficient excuse or reason stated why this bill was not filed when the action in which the judgment was rendered was pending in the common law Court, if, indeed, the complainant was entitled to the relief now sought. But, in my judgment, the complainant is not entitled to the relief prayed for. The dividends of the stock was the property of the infant ward. The mother, to whom the complainants paid them, was her natural guardian. The 1794th section of the Code declares, that the natural guardian cannot demand or receive the property of the child until a guardian's bond is filed and accepted by the Ordinary, which it is not pretended was done in this case. This provision of the Code is a wise one, and was intended for the protection of infants, and a Court of equity has no more power or authority to disregard and violate the provisions of a positive statute than a Court of law, or to grant any relief to a party who has violated it. From what source does a Court of equity derive its power and authority to dispense with and disregard the provisions of a positive statute? A positive statute, when enacted in pursuance of the Constitution, prescribes a rule of conduct for the government of Courts of equity as well as Courts of law, no matter what abstract notions of justice the Courts may entertain in the cases controlled by it. If it were otherwise, the rights of the citizen would be entirely dependent upon the judgments of abstract equity, instead of the positive law prescribed.

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the supreme power of the State, for their government. The complainant having paid the dividends in violation of the provisions of a positive statute, and in violation of the policy of the State, as manifested by that statute, a Court of equity cannot grant the relief prayed for any more than a Court of law could have done.

MANUFACTURERS' BANK OF MACON, plaintiff in error,
vs. HENRY J. LAMAR, defendant in error.

The holder of bank bills, issued before June, 1865, gives them in evidence on what he swears, on the trial, he was willing to sell them and pay the taxes due on that valuation, there being no contradiction of the value of the bills, it is a sufficient compliance with the Relief Act of 1870.

The bank, not specially authorized by its charter to do so, could not in 1862, issue any of its bills, intended to be used as money, receivable otherwise than with gold or silver coin. Where it did issue bills at that date, in the usual form, it is inadmissible in a suit on them by a bona fide holder, who did not receive them from the bank, but received them from others, to prove that they were intended by the bank to be payable in Confederate currency, and were so understood in the community in which the bank was located. The Ordinance of 1862 does not apply to such contracts.

Relief Act of 1870. Tax-affidavit. Bank bills. *Bona fide* holder. Before Judge COLE. Bibb Superior Court. Term Adjourned Term, 1871.

Henry J. Lamar brought suit against the Manufacturers' Bank of Macon on six hundred and thirteen bank notes, amounting, in the aggregate, to \$1,904.

The defendant pleaded, 1st. The Relief Act of 1870, in reference to set-off and recoupment. 2d. That \$1,693 of the notes sued on were issued on a Confederate bond, with the understanding that they were redeemable in Confederate treasury notes, and that, therefore, they should be scaled. 3d. That the notes sued on, dated in 1862, being understood to be payable in Confederate treasury notes and not in specie,

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were illegal and void as against the stockholders of said bank. 4th. That said notes were purchased by the plaintiff at about the value of Confederate money, and for much less than their face value; that said bank is insolvent; that, therefore, plaintiff is only entitled to recover from said bank the amount paid for said bills. 5th. That said bank suspended payment in the fall of 1860, and when reorganized, in 1862, it was on a Confederate basis, its assets being Confederate currency and Confederate States securities, payable in said currency; that this was the condition of the bank when the notes, dated in 1862, were issued; that plaintiff, by reason of his residence and doing business in the city of Macon, received said notes sued on with full knowledge of the said facts; that, therefore, the stockholders are not liable on said notes, and if liable, only for the value of said notes in Confederate currency.

Plaintiff testified as to the payment of taxes on the notes sued on, as follows: Witness has been the holder of some of the bills sued on since 1860; has purchased most of them since the war; witness has paid taxes on all the bills sued on regularly since he has owned them; does not remember exactly what he estimated them at; thinks it was about forty cents on the dollar; witness always considered the defendant solvent and liable and able to redeem its bills in good currency; witness estimated the bills at what he believed them to be worth; was always willing to take for the bills the amount for which he gave them in for taxes; has never failed to give in and pay taxes since witness has lived in Bibb county.

The jury returned a verdict for the plaintiff for the sum of \$1,904, with interest from January 1st, 1870.

The defendant moved for a new trial upon the following among other grounds, to-wit:

1st. Because said verdict, if it is held to include a finding that plaintiff had duly paid all legal taxes on the bills sued on, is strongly and decidedly against the weight of evidence and is without any evidence to support it.

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2d. Because the Court erred in refusing to allow William Cherry, the president of defendant, to testify that the statements in the plea as to the insolvency of said bank and alleged illegal issue of the bills dated in 1862, were true.

3d. Because the Court erred in refusing to allow said W. Cherry to answer the following questions propounded by defendant's counsel: Whether said bank was reorganized in 1862, prior to the issue of the bills sued on, bearing date in that year? if so, whether it was on a Confederate or specie basis? Whether said bank was solvent or insolvent when the bills dated in 1862 were issued? Whether there were any specie paying funds belonging to said bank when said bills were issued? In what currency the bills issued in 1862 were intended by the officers of said bank, and universally understood by the community, to be paid in? Whether said bills dated in 1862 were issued with the understanding by said bank, the community and the bill-holders, that they were payable in Confederate money, specie, or what? Whether said bank is now insolvent or solvent, and to state if he knew what plaintiff paid for the bills sued on?

The motion for a new trial was overruled by the Court and plaintiff in error excepted and assigns said ruling as error.

LANIER & ANDERSON, for plaintiff in error.

A. O. BACON; THOMAS J. SIMMONS, for defendant.

MONTGOMERY, Judge.

1. The fourth section of the Relief Act of 1870 does not require the jury to return a separate finding upon the question of payment of taxes by the plaintiff, unless they are of opinion that the taxes have not been paid, and in that case it is required, because if the plaintiff has not paid the taxes the defendant is entitled to a dismissal of the suit, not to a verdict. The proof of the payment of taxes by the plaintiff removes the burdens cast upon him by the law to entitle

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him to a recovery, and is necessarily found in his favor by a general verdict for him. We think the proof on this point warranted the verdict.

2. It is not pretended in this case that there is any special authorization to the bank by the Legislature to issue bills in 1862 redeemable in anything but gold and silver coin. The law upon this subject is positive, that no bank shall issue bills "payable or redeemable in any other manner or in any other thing than with gold and silver coin." If it does, it is a misdemeanor on the part of its officers: Act of 1837, sections 2 and 3; T. R. R. Cobb, 103; Act of 1838, section 4; *Ibid.*, 104. The Code is to the same effect: section 1478, par. 4. The Acts of 1837 and 1838 were of force at the time the bills of the bank were issued in 1862. A purchaser had the right to presume that the bank intended to comply with the law, to say nothing of introducing parol evidence to prove that a written contract meant what the law said positively it should not mean, and which, on its face, purports to comply with the law as it existed at the time. We do not think the Ordinance of 1865 was intended to go so far as to permit parties to give in evidence an illegal intention on their part to relieve themselves from liability. No man shall take advantage of his own wrong.

Judgment affirmed.

GEORGE HENDERSON, plaintiff in error, *vs.* SAMUEL A. GREER, *et al.*, defendants in error.

New trial. Before Judge HARRELL. Terrell Superior Superior Court. November Term, 1870.

This case was returned to the July Term, 1871, of the Supreme Court. When called, the death of Samuel A. Greer was suggested, and the following order passed.

"The death of Samuel A. Greer, one of the defendants in error, having been suggested of record, and it appearing to

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the Court that there is no representation of his estate, and that the said Greer died since the filing of the bill of exceptions in said case: It is ordered that the plaintiff in error be allowed, at the next Term of the Court, to open the record and proceed to a trial of said case, and that this order be published sixty days before the next Term, as prescribed by the rules of this Court."

At the January Term, 1872, said cause was again continued for want of parties, At the July Term, 1872, defendant in error moved to dismiss the writ of error, on the ground that there had been no service of the aforesaid order, either by publication or personally, under the 26th rule of Court.

The writ of error was dismissed.

A. HOOD; H. MORGAN, for the motion.

WRIGHT & WARREN; C. B. WOOTEN; W. A. HAWKINS, contra.

JEREMIAH WALTERS, plaintiff in error, vs. HENRY MORGAN, defendant in error.

Before Judge STROZIER. Dougherty Superior Court. December Term, 1871.

HINES & HOBBS; Z. P. ODUM, for plaintiff in error.

D. H. POPE; H. MORGAN, for defendant.

When this case was called a motion was made by counsel for defendant in error to dismiss the writ of error, because the bill of exceptions failed to show that it was presented and certified to by the presiding Judge, within thirty days from the adjournment of the Court at which the rulings complained of were made. It did not appear, from the record when the December Term, 1871, of the Superior Court of Dougherty county adjourned. The motion was sustained and the case dismissed.

Jones vs. Groover, Stubbs & Company *et al.*

FRANCIS A. JONES, plaintiff in error, vs. GROOVER, STUBBS & COMPANY *et al.*, defendants in error.

1. Where a mortgage and notes secured by it are placed in the hands of an attorney for foreclosure and suit, one of the conditions of which mortgage is, that the mortgagor shall pay all expenses of foreclosure, including attorney's fees, and the attorney takes the rule nisi, calling on the defendant to show cause why the mortgage should not be foreclosed for the amount due, and ten per cent. thereon as attorney's fees, and the attorney also commences a common law suit and gives written notice to the defendant not to settle or compromise with plaintiff, except through the attorney; notwithstanding which the defendant does compromise the case with the plaintiffs, without the knowledge of the attorney, the latter is entitled to a rule absolute to the extent of his fees, in the absence of any cause shown to the contrary.
2. The absence of defendant's counsel, by leave of Court, on the day the rule absolute was taken, but who had left with plaintiff's counsel a written consent that the rule might be taken unless, before a certain day named, which had passed, a satisfactory settlement was had, is no ground for enjoining the levy of the execution issued upon the rule, especially where such injunction is not asked until after the return term of the execution has passed, and there is no allegation of the insolvency of the plaintiffs or their attorney, or of any good defense which could have been made to the rule.

Refusal of injunction. Attorney's fees. Leave of absence. Before Judge GIBSON. Burke county. At Chambers. July 15th, 1872.

Francis A. Jones filed his bill against Groover, Stubbs & Company and John L. Smith, sheriff of Burke county, making the following case:

On April 19th, 1870, Jones gave to Groover, Stubbs & Company his note for \$7,500, secured by mortgage upon certain real estate in the counties of Burke and Emanuel, due November 20th next thereafter. The mortgage contained a provision for the payment of all attorney's fees by the mortgagor in case default was made in the settlement of the amount due on the same at the maturity of the note. Groover, Stubbs & Company proceeded to foreclose the mortgage at the May Term of Burke Superior Court, 1871. Plaintiff

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He *nisi*, Jones called on Groover, Stubbs & Company complained of this proceeding, and they proposed to withdraw the proceedings if he would pay them, by the day ... , 1871, the sum of \$..... This Jones refused to do unless he should be relieved from attorney's fees; they said, "Well, pay the amount suggested and that shall be enough," or words to this effect, and accordingly, in the fall, at that time before Burke Court convened, he paid said sum at the time agreed on. On Monday, the first day of Court, Frank H. Miller, Esq., being aware of the settlement of the case and also of the absence of Stephen A. Corker, Esq., appeared for Jones, by leave of the Court, entered a rule against him for the amount of his and Thomas E. Loyd's services as counsel for Groover, Stubbs & Company, to-wit: the sum of \$813 43, being ten per cent. on the amount alleged to be due on the mortgage. The execution is proceeding against the property of complainant. The bill prays that the rule absolute may be set aside and said Groover, Stubbs & Company be required to pay said attorney's fees, or, in default of this, that a new trial may be awarded to complainant with the privilege to insist on all his legitimate defenses as though the case were for the first time on trial; that, in the meantime, said execution be enjoined.

The bill was annexed a statement, as an exhibit, by which it appears that complainant was still indebted to Groover, Stubbs & Company in the sum of \$2,863, after allowing for the said credit. The bill was presented to Judge Gibson on May 19th, 1872.

In answer of Groover, Stubbs & Company showed that they only agreed to withdraw the proceedings of foreclosure of the mortgage upon the payment of \$7,975 91, and all expenses and counsel fees which had accrued. They expressly stated that they never contracted to pay said fees.

An affidavit of Frank H. Miller, Esq., which, together with other affidavits, unnecessary to an understanding of the facts of the case, were read on the hearing of the application for injunction, was as follows, to-wit:

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"Personally appeared Frank H. Miller, who being duly sworn, says, that in the month of May, 1871, he was employed by Thomas E. Loyd, Esq., to take charge of the collection of certain claims of Groover, Stubbs & Company, one of which consisted of a note of Francis A. Jones for \$7,500, dated April 19th, 1870, and secured by mortgage of that date on lands of F. A. Jones, in Burke and Emanuel counties. That the original petition for foreclosure in Burke, and rule *nisi*, was prepared by T. E. Loyd and forwarded to Burke Court. It was duly taken at May Term, 1871, wherein defendant was called upon to show cause why he should not pay the debt, with counsel fees of ten per cent. thereon. This was served personally, as appears by the service, July 18th, 1871, on F. A. Jones. The original mortgage and note were not received by deponent from Mr. Loyd until August 20th, 1871. After this, deponent prepared a writ against defendant at common law, to November Term, 1871, and sent the same to S. A. Corker, Esq., who, deponent was informed, was one of Jones' attorneys. On this writ appeared the following written notice:

"Notice is hereby given to the defendant not to compromise or settle this action against him except through the undersigned, as no other settlement will release him from liability for the attorney's fees of plaintiff.

"FRANK H. MILLER, plaintiff's attorney."

This writ was returned to deponent by S. A. Corker, Esq., with the acknowledgment of Jones in person thereon, as of October 17th, 1871. Subsequently, deponent had taken, at October Term, 1871, a rule *nisi* to foreclose in Emanuel county. On Monday, November 21st, 1871, the first day of November Term, 1871, of Burke Superior Court, deponent ascertained from the Clerk that no cause had been shown by defendant to the rule *nisi*, nor had he paid any money, when he called on S. A. Corker, Esq., to know if his client would pay, or if a rule absolute should be taken. He, Corker, stated that he was informed the matter had been settled, but

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state how. Deponent thereupon called Mr. Corker to the fact that his client had been notified not except through him, deponent. Deponent immediately to T. E. Loyd for information, and remained at Superior Court that day and the next, when, not and desiring not to fail to obtain judgment at that wishing to ascertain the truth of the statement as settlement, he took from Corker & Dickson, defendants, a statement in writing as follows:

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"Petition and rule nisi to foreclose.

hereby agreed, on the part of defendant's attorneys, rule absolute shall be entered on the minutes of the

Friday, the 25th November, 1871, unless before a satisfactory settlement is had, and that if, from Court should finally adjourn before said day, and sent be had, the same shall be entered on the minute Court, and execution issue as of this date, November 1st, 1871.

F. A. JONES,

"By CORKER & DICKSON, his attorneys."

day, 24th, and Saturday, 25th of November, 1871, was at Burke Court, but not having heard any- waited longer at Mr. Corker's request. On Sunday, received a letter from T. E. Loyd, per J. R. Saussy, 22d, which had been forwarded from Waynesboro, at Groover, Stubbs & Company had requested him to have the cases against Jones stopped for the but did not say what arrangement they had made, ted the proceedings to be continued, and send de- bill, which he would present for payment and send collected. Deponent forwarded his bill November 1, but received no reply; whereupon he wrote J. ; who had been acting for Mr. Loyd to find out of settlement. Not hearing from either, deponent S. A. Corker December 26th, 1871, for the same

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information, and received his reply, dated December 30th, 1871, that he saw Mr. Jones in reference to deponent's fee, and he said there was a small balance due to Groover; that he would arrange with them the matter before final settlement. Subsequently, early in January, deponent met Mr. Corker and asked him the terms of settlement, when he replied he did not know. Deponent went to Savannah January 29th, 1872, and found Mr. Loyd ill. Deponent then called in person on Groover, Stubbs & Company to ascertain the terms of settlement and to see if they would pay his fee, but they referred him to Mr. Loyd without giving any explanation. The next day deponent saw Mr. Loyd by appointment with him, and Groover, Stubbs & Company, but Groover, Stubbs and Company did not keep their appointment, nor would go to see Mr. Loyd when sent for. While in Savannah deponent ascertained the counsel fees in all cases to be ten per cent. on the amount as claimed in the rule nisi.

At the Adjourned Term of Burke Superior Court on February 5th, 1872, deponent moved for judgment for counsel fees on the amount due. After making most diligent efforts, he had not then obtained information of the terms of settlement or of any settlement had, and believing that there was collusion to prevent the payment of counsel fees, he pressed the motion. S. A. Corker was not present on that day, but the motion was resisted strenuously by J. S. Hook, Esq., counsel for F. A. Jones, and Mr. Dickson, of Corker & Dickson. No plea had been filed, or cause shown, and upon the production of the mortgage and the written consent of Corker & Dickson, with the rule nisi requiring cause to be shown as to attorney's fees, the Court granted the rule absolute. On the evening of the same day deponent met S. A. Corker, Esq., in Augusta, and informed him of what had been done in this and other cases against Jones. Deponent heard no objection at the time, or at any time, from Mr. Corker as to his right to proceed as has been done, until the filing of the bill for injunction. On the 8th of February, 1872, de-

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ponent received a letter from Corker about other cases against F. A. Jones, but no reference to this was had, and no motion was made in the case before adjournment, although the Court lasted nearly all the week.

After this Term, to-wit: February 23d, 1872, Francis A. Jones called on deponent and stated that Groover, Stubbs & Company agreed with him to pay the fees when he settled with them; that there was a balance due, and he was going to Savannah at once to have both matters settled; but it was not until March 16th, 1872, that deponent learned positively what F. A. Jones had paid Groover, Stubbs & Company, and what was still due them. This information was received upon an investigation before auditors of the affairs of F. A. Jones, executor of M. D. Jones. Deponent then learned that on November 20th, 1871, the first day of Court, \$7,975 91 was paid, and there was still due \$2,863 on this mortgage. It is to be borne in mind that during the whole of these proceedings there was pending a petition, and rule *nisi* and suit at common law against Jones, as executor of M. D. Jones, on a note for \$7,500 not yet disposed of, but which F. A. Jones had assumed individually, and was included in his settlement of November 20th, 1871, with Groover, Stubbs & Company. On the 19th of February, 1872, deponent ordered execution to issue, with instructions to the sheriff to levy the *fi. fa.* at once, which the Clerk informed deponent under date of March 6th, 1872, he had done. No advertisements have been made of any levy to deponent's knowledge. Deponent swears that Groover, Stubbs & Company are, to the best of his knowledge and belief, entirely solvent, and that Thomas E. Loyd and himself are also.

(Signed)

FRANK H. MILLER."

* Sworn to and subscribed before me,

June 10th, 1872.

(Signed) WILLIAM GIBSON, J. S. C."

The injunction was refused on July 15th, 1872, and complainant excepted, and assigns said ruling as error.

HOOK & GARDNER, for plaintiff in error.

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THOMAS E. LOYD; FRANK H. MILLER, for defendants.

1. The Court below had no jurisdiction: 40 Ga., 228; Code, sec. 4124. 2. The bill was filed too late to enjoin *fi. fa.*: 1 Equity Rule; 37 Ga., 583. 3. It contained no sufficient allegations of any defense existing at the time of judgment, of any injury received from his counsel's absence, or that he has now any defense: Bell *vs.* Marietta P. M. Co., decided February 13, 1872. 4. Misunderstanding between client and attorney as to defense, no ground to set aside judgment: 40 Ga., 506. 5. When notice is given not to settle, defendant is bound for fees due from plaintiff's attorney: Code, sec. 1980; 39 Ga., 5. And certainly when called upon to show cause why he should not pay, as agreed under the mortgage. 6. The facts show such conduct on the part of F. A. Jones and Groover, Stubbs & Company, as amount to legal fraud, to defeat or postpone the rights of the attorneys to their fees, which is not allowed: 39 Ga., 7. 7. An attorney is not required to prove his claim for fees, except in cases of *tort*, when there is no evidence of the existence of any reasonable cause of action: 36 Ga., 629. 8. No error to refuse injunction on such grounds as constitute no defense to the action: 30 Ga., 664. 9. When a party has his day in Court, equity cannot relieve, even if judgment is wrong: 32 Ga., 362; 16 Ga., 398; Code, sec. 2621. 10. To have allowed such writ would relieve the sheriff, who is already liable: 25 Ga., 437; 11 Ga., 297; Kimbro *vs.* Edmondson, decided September 17th, 1872. 11. Insolvency of Groover, Stubbs & Company, or their attorneys, must be alleged in any case to restrain an execution: 15 Ga., 533; 26 Ga., 485. But cannot be when, by complainant's own showing, a large balance is still due by him to Groover, Stubbs & Company, unpaid, which he does not and has not tendered: 42 Ga., 412. 12. It is true that leave of absence dispenses with the discharge of professional duties: 25 Ga., 158; 36 Ga., 54. But with reference to matters arising during the time of the leave and which relate to cases where a meritorious defense has been

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filed: Bell vs. Marietta P. M. Co., decided February 13th, 1872; 43 Ga., 376; Smith vs. Brand, decided February 20, 1872; Rust, Johnson & Co. vs. Ketchum & Hartridge, decided July 16, 1872.

MONTGOMERY, Judge.

Section 1980 of the Code provides that "parties cannot, by settlement between themselves, defeat the attorney of any lien or claim under contract with his client of which the opposite party had notice prior to the consummation of such settlement." Judge McCAY, in *Hawkins vs. Loyless*, 39 Georgia, 5, seems to think the lien must be created by contract and that the section does not apply to liens arising by operation of law. With due deference to the opinion of my associate and that of Judge Walker, in *Grey vs. Lawson*, 36 Georgia, 630, it strikes me that the section applies to *all* liens which attorneys may have, whether created by contract or arising by operation of law. Attorneys seldom or never take liens from their clients by contract; but are content to rely on the lien given them by operation of law. They often make contracts with their clients, out of which their claim for remuneration arises, or rather, to speak more accurately, by which their claim for remuneration is measured. Hence I think it is the claim alone which is to be under contract. The view here presented seems to be sustained by the section immediately preceding (section 1979,) which says attorney's liens, without saying how created, shall attach upon all property recovered by them, and be superior to all other liens. Section 1980, is but a continuation of the same subject. True, there is no comma after the word lien; but how many of our laws will bear the test of rigid rules of punctuation?

Be this as it may, the attorney in this case had "a claim under contract with his client" for the payment of such fees as his services were reasonably worth, and the complainant had notice not to settle with the mortgagee except through the attorney, and had agreed in the mortgage to pay the attorney's fees; and the rule *nisi* had called upon him to show

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cause why he should not do so. Judge Walker, *arguendo*, in *Grey vs. Lawson*, 36 *Georgia*, 630, says, in an action of *tort* the attorney must have a "lien or claim by special contract" of which the defendant must be notified before settlement to bind him. What is meant by "special contract" is not very clear. If he means an express contract for a definite fee, that question is not made by the case. The questions there decided are that an attorney must give notice of his intention to look to the defendant for his fee before settlement of the case by the defendant with the plaintiff, and the mere fact of his appearance is not such notice; and in an action of *tort*, even if he give such notice, he cannot hold the defendant liable for his fee, until he show that the defendant was liable to the plaintiff in damages for as great an amount as the fee claimed, for "it may appear on the trial that the plaintiff had no sufficient cause of action; or, if his action be maintainable, he may be entitled to mere nominal damages, much less than the claim of the attorney for his services; in either event the defendant should not be made to pay for the benefit of the attorney more than the plaintiff had a right originally to recover," and therefore the case ought to go to a jury to determine the liability of the defendant to the plaintiff before the Court can know whether he is bound to pay the attorney anything. In that case the defendant availed himself of his defenses before the Court below granted the judgment in favor of the attorney, from which the defendant promptly appealed and the judgment was reversed. That case differs from the case at bar in several particulars; that was a suit for a *tort*, in which a jury alone could determine how much, if anything, was due by the defendant; this was a rule to foreclose a mortgage in which a jury is never necessary, unless the defendant sets up some defense. In that case, no notice was given by the attorney to the defendant; in this, the notice was given. In that, the defendant contested the attorney's right to take judgment against him *in initio*; in this, judgment was permitted to go by default. Indeed, it was more than a judgment by default; the

absolute was taken under the written consent of the defendant's counsel, that in the event of a failure to make a satisfactory settlement by a given time, which had passed without such settlement, the rule might be made absolute. Nor was it necessary to show the amount due on the mortgage. If the amount of the mortgage was not due at the time it was placed in the hands of the attorney, the complainant should have appeared, as the law provides, and shown it. But neither that was done, nor was any other cause shown in answer to the rule *nisi*, why the rule should not be made absolute. Under this state of facts, we think the attorney was entitled to his rule absolute for the amount of his fees.

2. Although the complainant's counsel was absent at the time the rule was made absolute, yet he had left his written consent that the rule should be taken. Why, then, should the plaintiff in the rule be delayed? Had counsel intended to withdraw from his consent to let the rule be taken, he ought to have given notice of such intention. That there was, or may have been, a misunderstanding between himself and his client, is no reason why the judgment should be set aside: *Kite vs. Lumpkin*, 40 *Georgia*, 506. His client should have informed him of any defense, if he had any. He not only failed to do so, but his bill fails to show any defense he could have made to the rule had he been present. He had written notice not to settle except through the attorney; he had agreed, in the mortgage, to pay the necessary fees, and the rule *nisi* called on him to show cause why he should not pay the ten per cent. on the amount of the mortgage as attorney's fees; yet, he not only failed to make any defense, but, through his counsel, gave written consent that the rule should be taken. Whatever defense he had should have been made in answer to the rule *nisi*. He shows no sufficient reason why it was not done. "The well settled rule is, that the judgment concludes all disputes between the parties, unless there be fraud, accident or mistake, unmixed with any negligence of the party complaining:" 40 *Georgia*, 509. Here was negligence in not answering the rule, if the defendant

Wharton and Bell *vs.* Jossey.

had any available defense. If he had not, he is not hurt. The complainant not only failed to answer the rule nisi, but he has delayed to file his bill for an unreasonable time, and has not alleged any damage which he may suffer, if the Court fail to interfere, or that the defendants are insolvent and unable to respond if he does. If Groover, Stubbs & Company promised to relieve him from the payment of counsel fees, as alleged in the bill, he has his recourse upon them. But that is no reason why the attorneys should be delayed in the payment of their claims.

Judgment affirmed.

JEPHTHA WHARTON and JAMES W. BELL, plaintiffs in error
vs. J. W. JOSSEY, defendant in error.

Where the plaintiff employed a servant who was indebted to one of the defendants in the sum of \$24, in satisfaction of which he had previously contracted to split rails, and defendants removed said laborer and his wife from the control of plaintiff, defendants were not liable for damages to plaintiff until the expiration of a reasonable time for the performance of the contract as to the rails. (R.)

Master and servant. Before Judge CLARK. Webster Superior Court. September Term, 1871.

All the facts necessary to a clear understanding of this case are set forth in the decision.

W. A. HAWKINS; HAWKINS & GUERRY; THOMAS H. PICKETT, for plaintiffs in error.

No appearance for defendant.

WARNER, Chief Justice.

The plaintiff brought his action against the defendant for persuading, enticing and decoying off from his employment on his plantation, two servants, to-wit: Isaac Brown and his wife Emily. On the trial of the case the jury found in favor of the plaintiff.

dict for the plaintiff for the sum of \$191. The defendants made a motion for a new trial on the several grounds set forth in the record, which was overruled and the defendants accepted. It appears, from the evidence in the record, that on the 4th day of January, 1871, the plaintiff made a contract with Brown, and employed him as a laborer to work on his plantation for that year, and moved him and his wife there the next day thereafter; did not know that Brown had been employed by Wharton. On the 7th January the defendants removed Brown and his wife from plaintiff's plantation to Sampson Bell's. It also appears, from the evidence, that Brown, at the time he hired himself to the plaintiff, was living with Wharton, one of the defendants, and had been living with him the previous year, and was indebted to him the sum of \$24; that Brown had contracted with Wharton to split rails for him to pay the debt. This contract of Brown with Wharton had not been complied with when the defendants removed Brown and his wife from the plaintiff's plantation. This suit was commenced on the 21st February, 1871. In our judgment, the plaintiff had no cause of action against the defendants until the expiration of the time for which Wharton had employed the servant to split the rails and payment of his debt, in the exercise of ordinary labor and diligence for that purpose. Until the servant had completed his prior contract with Wharton, the plaintiff had no claim to his services under his contract. So far as it is shown by the record, at the time the suit was commenced, Brown, the servant, was in the legal employment of Wharton. The plaintiff's right to his services under his contract did not accrue until after the expiration of the servant's contract with Wharton. If the defendants had detained the servant for an unreasonable time, under the pretext of performing his contract with them, or either of them, and thereby deprived the plaintiff of his services under his contract, with knowledge of the same, then the plaintiff would have had a cause of action against them.

Let the judgment of the Court below be reversed.

Lane vs. Collier.

WILLIAM M. LANE, plaintiff in error, vs. FRANCIS P. COLLIER, administrator, defendant in error.

If land be sold, and the purchaser indorse the note of a third person to the vendor in payment, and transfer a mortgage to him, securing said note, there is no such novation of the contract, no change in the relations of the parties to each other as to deprive the vendor of his right to enforce the payment of the purchase money by levy on the land, (which has been set apart by the purchaser as a homestead) under execution against the indorser and maker of the note. The land was the consideration given for the indorsement of the note and mortgage. Until they are paid the vendor's claim for the purchase money is superior to the homestead, and the land may be subjected to its payment.

Claim. Homestead. Novation. Indorsement Before Judge ANDREWS. Oglethorpe county. At Chambers. December 27th, 1871.

Francis P. Collier, as administrator of E. V. Collier, recovered a judgment against John W. Stephens, as principal, and William M. Lane, indorser, for the sum of \$2,722 06, principal, besides interest and costs. The execution based upon this judgment was levied upon a certain tract of land in the county of Oglethorpe, as the property of the defendant, Lane. Lane filed a claim to such portion of the said land as had been set apart to him as a homestead. The question as to whether the land was subject to said execution was submitted to the presiding Judge upon an agreed statement of facts to be decided, upon argument, at Chambers.

The facts agreed upon are substantially as follows:

Plaintiff sold to the defendant, Lane, part of the land levied on, which was claimed as a homestead, in December, 1868. At the time Lane received a deed to said property from plaintiff, he paid for the same, and also for the gin and running gear, worth about \$100, the sum of \$4,500 in notes on different persons. He never gave his own note, or any other obligation for said land, beyond his indorsement. One of the notes thus indorsed and transferred was the basis of the judgment above mentioned. A mortgage given to Lane to secure the payment of said note was also transferred to plaintiff.

e Court held the land subject to said execution, and ordered the claim dismissed. To which ruling the defendant, excepted, and now assigns the same as error.

IN C. REED, for plaintiff in error. Effect of indorsement: 1 Smith's Lead. Cases, 452. Undertaking of Lane: sec. 2738; Story's Prom. Notes, 135; Act of 1843. Indorsement of surety is accessory to that of principal: Act of 1843, sec. 2121; 29 Ga. R., 456.

BERT TOOMBS; S. H. HARDEMAN, for defendant. The issue is for the purchase money of the land: Constitution of Georgia. Indorsement is a new contract: Story on Prom. Notes, 2 Kent's Com., 460; 3 East. R., 482; 2 Burrows R., 17 Johns. R., 511; 2 Ga. R., 161; 4 Ga. R., 4; 39 Ga. R., 531; 6 Cranch R., 224.

MONTGOMERY, Judge.

The position of counsel for plaintiff in error in this case is that the contract for the purchase of the land was one of indorsement, and that the indorsement of a note of a third person in settlement of the purchase money, as he contended, quite another. In the first case, the maker was the primary debtor; in the second, his liability subordinate to that of the maker; that his indorsement, Collier's acceptance of it, put him in the position of a surety; that the indebtedness for the sale of the land was extinguished, and Collier must look to the contract as contained in the note, which was not given for the purchase money of the land, and that, therefore, an execution issuing on a judgment obtained upon the note, could not be levied on the land after it had been set apart as a homestead; that this is a novation here by the introduction of a new party, and the old contract is destroyed. The argument of the defendant's counsel is certainly ingenious, and displays great ingenuity and fertility of resource. The doctrine contended for is undoubtedly correct, under our law, that the indorser is not a surety; but not only surety—and herein consists the fallacy.

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lacy—he is still an indorser, and the common law principles applicable to that character still adhere to him. Every indorsement of a promissory note is the drawing of a bill of exchange by the indorser upon the maker. Suppose the trade had been a cash transaction, and Lane, instead of paying the actual cash, had drawn a draft upon his factor in Augusta, to whom he had sent his cotton. Would the acceptance of this draft by Collier have discharged Lane as primary debtor, and have amounted to a novation of the contract? Or suppose he had given Collier a check upon a bank for the money and the bank had failed before it could be presented, would Lane be only secondarily liable on such a paper? The facts show that Collier took the note on the faith of Lane's indorsement, and the land was the consideration of the indorsement, refine upon it as we may, and Collier had the right to look to Lane in every character in which the nature of the transaction legally placed him, whether as surety, indorser, or drawer of a bill, or even as maker of a note—for every indorsement is said to be the making of a new note. As to novation no new party is introduced into the contract between Lane and Collier—that contract is only represented by the indorsement. The maker of the note was not present and joining in that, but a contract which the maker had formerly made with Lane was by the latter transferred to Collier. Suppose it had been an open account so transferred, would the debtor on an open account have been a party to the contract?

In any view we take of it we cannot divest the case of the prominent fact that Lane indorsed the note for the land, and that a judgment against him as such indorser is a judgment for the purchase money of the land, and takes precedence of the homestead.

We, therefore, affirm the judgment, provided the plaintiff in *fi. fa.* will dismiss his levy upon all land included in the homestead of the plaintiff in error, which was not purchased from Francis P. Collier.

Judgment affirmed.

THOMAS K. APPLING, plaintiff in *fi. fa.*, plaintiff in error,
vs. STEPHEN ODOM, defendant in *fi. fa.*, and A. J. MER-
CIER, claimant, defendants in error.

An owner of land, who contracts with a cropper that he shall furnish to the cropper certain supplies with which to make the crop, and that the share of the cropper should not be moved from the place until such advances are paid for, has a right to retain the crop until said advances are paid, against the cropper and all purchasers from him, or mortgagees, subsequent to the date of the contract.

Lien of landlord. Before Judge HARRELL. Early Superior Court. April Term, 1872.

On the 28th day of November, 1871, Stephen Odom executed a mortgage on all his crop of corn and cotton grown on the plantation of A. J. Mercier, in the county of Early, to secure the payment of a promissory note of same date, payable one day after date, for \$270. This mortgage was foreclosed, and on December 6th, 1871, an execution was issued and levied on the following day on five bales of seed cotton, more or less, as the property of said Stephen Odom. On February 2d, 1872, a claim was filed to said cotton by A. J. Mercier.

On the trial of the issue formed upon said claim, it appeared, from the evidence, that there was a contract between A. J. Mercier, of the one part, and John Mozee and said Odom, of the other part, by which A. J. Mercier was to furnish the land and mules, and Mozee and Odom to furnish the labor to make a crop; that A. J. Mercier was to have one-half the crop for his rent; that eleven bales of cotton were made and packed; that the larger portion of two bales left standing in the field was lost on account of Odom's leaving the place; that one hundred bushels of corn, fifteen hundred pounds of fodder and three hundred and eighty-five bushels of cotton seed was also made; that the corn was worth \$1 15 per bushel, the fodder \$1 per hundred pounds, and the cotton seed twenty cents per bushel; that one John

Appling vs. Odom and Mercier.

Milton, as agent for Mercier, furnished Odom with about eight hundred pounds of bacon and about eight bushels of corn; that A. J. Mercier furnished supplies, in addition, to Mozee and Odom, all of which was to be paid for before the crop was to be removed from the place; that meat was worth in the spring of the year 1871 from twenty to twenty-five cents per pound on a credit and fifteen cents cash; that John Milton, as agent of A. J. Mercier, some time after the levy, together with the sheriff and some hands, divided the crop of cotton and the four and one-half bales levied on were placed in the hands of the sheriff; that Mozee was not present at the division and did not consent to the same.

The Court charged the jury that if the testimony showed that the sheriff and John Milton, as agent of A. J. Mercier, had divided the cotton and set it apart as the property of Stephen Odom, they must find the property subject to the *fi. fa.*

The jury returned a verdict for the claimant. Plaintiff *fi. fa.* moved for a new trial upon the following grounds, to-wit:

1st. Because the verdict was contrary to law.

2d. Because the verdict was contrary to evidence and strongly and decidedly against the weight of evidence.

3d. Because the verdict was contrary to the charge of the Court.

The motion for a new trial was overruled, and plaintiff in error excepted and assigns error upon each of the grounds contained in said motion.

A. HOOD, for plaintiff in error.

No appearance for defendant.

McCAY, Judge.

There is an obvious distinction between a cropper and tenant. One has a possession of the premises, exclusive of the landlord; the other has not. The one has a right

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Company moved to quash all of the foregoing *fi. fas.* upon the following grounds:

1st. That the affidavits do not specify the names either of the person or persons owing the debts, or of the person or persons owning the said property.

2d. That the pleadings no where show that demands were made for payment by the said plaintiffs upon the owner or owners of the said steamboat, or upon his or their agent.

And moved to quash the proceedings in the case of James Greyson upon the further ground that the execution commanded a levy "on the steamboat Governor Worth, the property of"

And also moved to quash the proceedings in the cases of Mike Collins and Adolphus Ball upon the further ground that the executions directed levies on "the steamboat Governor Worth, the property of Robert Erwin and Charles S. Hardee."

And also moved to quash the proceedings in the cases of Joseph F. Torrent and W. C. Ulmo, upon the further ground that the executions were issued against the goods, lands, etc., "of Charles S. Hardee and Robert Erwin, owners of the steamboat Governor Worth, and of the said steamboat Governor Worth."

And also moved to quash the proceedings in the case of Monahan, Parry & Company, upon the further ground that the order directed execution to be issued against "the owners of the steamboat Governor Worth, and against said steamboat," and not against the person or persons owing the debt.

And also moved to quash the *fi. fa.*, in the case of John Holmes against the steamboat Governor Worth, upon the ground that it commanded that "of the following property, that is to say, the steamboat Governor Worth, you cause to be made and levied the sum of \$12 50, which John Holmes, by his attorney, lately before me, made oath to be his claim against said steamboat and her owners, Robert Erwin and Charles S. Hardee, upon proceedings under lien, and also legal costs."

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Steamboat lien. Affidavit. Demand. Amendment. Before Judge SCHLEY. Chatham Superior Court. January Term, 1872.

A rule *nisi* was issued by the Superior Court of Chatham county calling on the sheriff to show cause why certain executions which had been lodged in his hands by Joseph F. Torrent and others had not been satisfied out of the funds arising from the sale of the steamboat Governor Worth. In answer to said rule, the said sheriff showed for cause that the said steamboat had been sold under foreclosure of mortgage, at the instance of the Cape Fear Steamboat Company, and that the sale did not produce a sufficiency of money to pay said execution; and that payment of the above-named *fi. fas.* was resisted by the said Cape Fear Steamboat Company, upon various grounds. The said *fi. fas.* were then submitted to the Court, with the proceedings upon which they were founded, to-wit, as follows:

“STATE OF GEORGIA—CHATHAM COUNTY:

“Before me, the undersigned, personally came and appeared, James Greyson, who, being duly sworn, upon oath saith that he was an employee as oiler on the steamboat Governor Worth, engaged in the navigation of the Savannah and Altamaha rivers, within and forming the boundary of this State, and that he has a demand against the owners of said steamboat for wages due him for personal services in connection with the same, as oiler as aforesaid, from the 18th day of April, 1871, to the 7th day of June, 1871, inclusive, a bill of particulars of which is hereunto attached, for fifty-two dollars. That this deponent has made a demand for payment of the said sum on Robert Erwin, the agent of said steamboat, and that the said Robert Erwin has refused to pay the same.

“That the said demand is now being prosecuted with a year after the said debt became due.

“And that the said steamboat is now lying at the

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Savannah, in the county of Chatham, having arrived at the place of destination to which it has been freighted.

"Wherefore he prays that this, his lien, against said steamboat for his debt for personal services due him as aforesaid, may be enforced in terms of the statute in such cases made and provided. (Signed)

"JAMES ^{his} ~~X~~ GREYSON.
_{mark.}

"Sworn to and subscribed before me
this 15th June, 1871.

(Signed) "PHILIP M. RUSSELL, Jr.,
"N. P. and E. O. J. P., C. C., Ga."

"Steamer Governor Worth and owners—

"To James Greyson, Dr.

"For services rendered on board said steamboat as oiler, say from April 15th to June 7th, 1871, at
\$30 per month.....\$52 00

"It is ordered that an execution issue instanter against the person owing the debt, and also against the said steamboat, for the amount sworn to be due, and the costs.

(Signed) "PHILIP M. RUSSELL, Jr.,
"N. P. and E. O. J. P., C. C., Ga."

"GEORGIA—CHATHAM COUNTY:

"To the sheriff, his deputy, or any lawful officer to execute and return.

"You are hereby commanded to levy on the steamboat Governor Worth, the property of, and make the amount of fifty-two dollars, the sum sworn to be due, and six dollars costs expended in this case.

"Given under my hand and seal this 15th day of June, 1871. (Signed) "PHILIP M. RUSSELL, JR., [L. S.]

"Notary Public and *ex officio* Justice of the Peace,
"Chatham county, Georgia."

Also, the proceedings in the case of Mike Collins, as watchman, against the said steamboat and owners thereof, for the recovery of \$52, in the same Court, and identical in form

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with the foregoing, except that the blank in the execution was filled up with the names of Robert Erwin and Charles S. Hardee.

Also, the proceedings in the case of Adolphus Ball, as cook and steward, against the said steamboat and owners thereof, for the recovery of \$37, in the same Court, and, in all respects, identical in form with those in the said case of Mike Collins.

Also, the proceedings in the cases of Joseph F. Torrent, as captain, for the recovery of \$282 33, and of W. C. Ulmo, as engineer, for the recovery of \$148 33, against the owners of the said steamboat, sued out in the Superior Court, but in form identical with the proceedings in the foregoing cases, except that the executions were issued against "the goods, lands, etc., of Charles S. Hardee and Robert Erwin, owners of the steamboat Governor Worth, and of the said steamboat Governor Worth."

Also, the proceedings in the case of Monahan, Parry & Company, as mechanics and machinists, against said steamboat and her owners, for the recovery of \$123 69, identical in form, in all respects, with those in the two cases immediately preceding, except that the order of the Judge directs that execution be issued against "the owners of the steamboat Governor Worth, and against said steamboat."

Also, the proceedings in the cases of Joseph Bennifield, as pilot, for the recovery of \$156 25; of Anderson Newsome, as pilot, for the recovery of \$180; and John Swain, as pilot, for the recovery of \$125, liens against said steamboat, and the owners thereof, the affidavits having been made before the Ordinary of Chatham county, and the said proceedings being, in all respects, identical in form with those in the above named cases in the Superior Court, except that the Clerk was required to issue the executions against "Robert Erwin and Charles S. Hardee, the persons owing the debt, and also against the said steamboat Governor Worth."

And thereupon, the counsel for the Cape Fear Steamboat

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Company moved to quash all of the foregoing *fi. fas.* upon the following grounds:

1st. That the affidavits do not specify the names either of the person or persons owing the debts, or of the person or persons owning the said property.

2d. That the pleadings no where show that demands were made for payment by the said plaintiffs upon the owner or owners of the said steamboat, or upon his or their agent.

And moved to quash the proceedings in the case of James Greyson upon the further ground that the execution commanded a levy "on the steamboat Governor Worth, the property of"

And also moved to quash the proceedings in the cases of Mike Collins and Adolphus Ball upon the further ground that the executions directed levies on "the steamboat Governor Worth, the property of Robert Erwin and Charles S. Hardee."

And also moved to quash the proceedings in the cases of Joseph F. Torrent and W. C. Ulmo, upon the further ground that the executions were issued against the goods, lands, etc., "of Charles S. Hardee and Robert Erwin, owners of the steamboat Governor Worth, and of the said steamboat Governor Worth."

And also moved to quash the proceedings in the case of Monahan, Parry & Company, upon the further ground that the order directed execution to be issued against "the owners of the steamboat Governor Worth, and against said steamboat," and not against the person or persons owing the debt.

And also moved to quash the *fi. fa.*, in the case of John Holmes against the steamboat Governor Worth, upon the ground that it commanded that "of the following property, that is to say, the steamboat Governor Worth, you cause to be made and levied the sum of \$12 50, which John Holmes, by his attorney, lately before me, made oath to be his claim against said steamboat and her owners, Robert Erwin and Charles S. Hardee, upon proceedings under lien, and also legal costs."

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After hearing argument, on the 13th of April, 1872, the Court pronounced the following decision :

“JOSEPH F. TORRENT *et al.*, *vs.* Steamboat GOV. WORTH.

Rule against Sheriff.

“ Under a *fi. fa.*, on foreclosure of mortgage at the suit of the Cape Fear Steamboat Company, the steamer Governor Worth was levied on as the property of Robert Erwin and Charles S. Hardee, and sold. Creditors claiming liens against the said steamboat, and owners under the Code, section 1968, intervene and claim a right to the fund superior to the mortgage, and rule the sheriff. The rule is resisted by the mortgagees on the ground that these creditors have not proceeded to enforce their liens in the manner prescribed by the Code. In the view taken of the Code, and of the decisions in other cases affecting the enforcement of liens on steamboats, I hold that the liens in all the cases before me, which *aver a demand upon the agent* and name him, sufficiently comply with the statute.

“ The Code, section 1969, provides that there must be a demand on the owner, agent or lessee, and a refusal to pay, and such demand and refusal must be averred. The disjunctive ‘*or*’ indicates that the demand must be made on the owner *or* on the agent; a demand on either is sufficient. And in the case in 6 *Georgia Reports*, the Court says, ‘the affidavit ought to state that the demand was made, and name the owner *or* the agent.’ The affidavits before the Court containing this averment are deemed sufficient in this respect. So far as the form of the affidavit made by these lien creditors are concerned, I believe the objection is the failure to give the names of the owners. All the other averments are made in accordance with the statute, except in the affidavits where no bill of particulars is attached; but in these cases the amount is stated specifically, and a demand on the agent and a refusal on his part to pay it, is averred. The amount sworn to be due is not traversed; and, therefore, the absence of the bill of particulars is not, in my opinion, a fatal defect.

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The statute only requires that the amount claimed to be due must be sworn to, and if the amount is not denied, the creditor is entitled to have judgment for the amount sworn to. Defects in the *fi. fas.* are amendable; but as the filing of the affidavit operates as a judgment in the case, and as these creditors claim, under their liens, a fund brought into Court by other process, it was not necessary that *fi. fas.* should be issued so as to entitle them to come in and claim the fund.

"Let an order be taken in compliance with the above rulings, distributing the fund amongst such of the lien creditors as come within the provisions of section 1968 of the Code. Such as claim a lien for 'supplies' furnished, as distinguished from claims for personal services on board, or for wood and provisions furnished, must be disallowed."

The Cape Fear Steamboat Company excepted to the said decision and assigns the same as error.

JACKSON, LAWTON & BASINGER, for plaintiff in error. The affidavits were insufficient: 6 Ga. R., 159; 7 *Ibid.*, 58. To give the Court jurisdiction the executions must be issued against "the persons owing the debts:" 40 Ga. R., 177; 1 *Ibid.*, 318; 12 *Ibid.*, 424. A judgment may be set aside on account of the uncertainty of the pleadings: 35 Ga. R., 176. Execution must follow the judgment: 39 Ga. R., 565. Demand can only be made on the rightful owner or agent: 11 Ga. R., 45; Story on Agency, sec. 36.

HARTRIDGE & CHISOLM; HARDEN & LEVY; ROBERT J. WADE, by brief, for the defendants. The affidavits are in the language of the Code: Code, sec. 1969. The affidavits are sufficient: 6 Ga. R., 163. Owners inaccessible, demand on agent sufficient: 5 Ga. R., 6 *Ibid.*, 164; Code, sec. 1969. Bill of particulars need not be attached: Code, sections, 1968, 1969; 3 Ga. R., 81. The filing of the affidavit is the judgment: Acts of 1870, 412; 30 Ga. R., 474. Error of Clerk in issuing *fi. fa.* cannot affect lien.

MONTGOMERY, Judge.

1. It is only by considering the proceedings against steamboats under section 1969 of the Code, as proceedings *in personam*, and not strictly proceedings *in rem*, that the jurisdiction of the State Courts can be maintained for the enforcement of the liens provided for by the preceding section: 40 Ga., 177. If proceedings *in personam*, necessarily the judgment must be against the *person* of the debtor. Under the Act of 1870, amendatory of the 1969th section of the Code, the affidavit is the judgment. It follows that the affidavit must set out the names of the owners or lessees, as the case may be, who owe the debt, as well as comply in other respects with the statute. And where the affidavit avers that the demand was made upon the agent, it should state that he is the agent of the persons owing the debt. It is said this is not in strict accordance with the grammatical construction of the section. That the Act says "there must be a demand on the owner or agent or lessee for payment," etc., and that this can only mean the owner of the boat, the agent of the boat, etc. Doubtless this is true, but is it anything more than the common figure of speech known to rhetoricians as personification, in which the owners or lessees are represented through the property thus impersonated? A boat is incapable of having an agent. We speak of the agent of a hotel, of a railroad, etc. Who is the principal in such a case? True, in proceedings *in rem* in maritime Courts vessels may be said to have agents. But to take this view of it would be to oust the State Courts of jurisdiction, as already indicated. And unless it is very plain that the Legislature mean to give judgment against one without a hearing, Courts will not give that construction to any Act which may bring about such a result. To hold that a demand upon the agent of the *boat*, as distinguished from the owner or lessee, is sufficient to authorize this summary proceeding, would be to decide that, in some cases, no judgment might be rendered—as, for instance, in cases

boat is leased, after service rendered by an employee for which he has not been paid, and a demand upon the agent of the boat while so leased. The old Act of 1841 only required that a demand should be made for payment, without stating upon whom or how it was to be made: See second section of the Act, 5 *Georgia*, 197-8. This Court held it must be made *personally* upon the owners or their agent, and that even a demand upon the captain of the boat was insufficient: *Butts et al. vs. Cuthbertson*, 6 *Georgia*, 159; 30th, 474. In view of these former rulings of this Court, and the very doubtful manifestation of an intention on the part of the Legislature to change the law as thus interpreted, we think that when the Code says "there must be a demand on the owner or agent or lessee for payment and a refusal to pay; and such demand and refusal must be averred," that it means a demand upon the agent of the owner or lessee, whichever may owe the debt. 2. The affidavit being the foundation of the proceeding—the judgment, in fact—the execution must conform to it, and cannot supply its defects. Where the affidavit contains all the requirements of the law, the execution, if defective, may be made to conform to it by amendment, if necessary.

Judgment reversed.

JOHN DOE, ex demise, JOSEPH R. SHIPP *et al.*, plaintiffs in error, vs. RICHARD ROE, casual ejector, and JOHN T. WINGFIELD, executor, defendant in error.

The statement of the overseer of defendant, who was in possession of the land, and managing his property for him as his agent, as to the reason why a fence was located in a peculiar manner, is admissible to prove the adverse possession of the defendant. (R.)

At the time of the commencement of this suit, the husband was the only person who could legally commence suit for land, the title to which was derived through the wife, consequently the statute of limitations ran during the coverture. (R.)

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Statute of limitations. Husband and wife. Separate estate. Adverse possession. Before Judge CLARK. Lee Superior Court, April Term, 1872.

Plaintiff in error brought ejectment on the several demises of Elizabeth Warmick, Joseph R. Shipp, and of Joseph R. Shipp in right of his wife, against defendants in error, for lot of land number two hundred and twenty-nine, in the first district of said county, containing two hundred and two and a half acres, more or less. The defendants relied on the statute of limitation.

The following evidence was introduced for the plaintiff:

1st. Plat and grant in usual form from the State of Georgia to Elizabeth Warmick, dated December 13th, 1836, for lot two hundred and twenty-nine, in the first district of Lee county, which showed no pond on the lines between lots two hundred and twenty-nine and two hundred and thirty.

2d. Certificate of marriage, in regular form, showing intermarriage of Joseph R. Shipp and Elizabeth Warmick, on January 31st, 1833.

3d. Admission of possessions.

The defendants introduced the following evidence:

1st. Deed from Alexander Shotwell to Nicholas Wiley, dated November 11th, 1836, for the "Philemea old town" plantation, which deed included six or seven lots, and among them lots two hundred and thirty and two hundred and twenty-nine, in the first district of Lee county; said deed not recorded, but admitted on proof of execution.

2d. Deed from A. Tison to Alexander Shotwell, dated November 1st, 1835, for lot two hundred and twenty-nine, first district of Lee county, recorded February 16th, 1836.

3d. The following testimony introduced on a former trial by agreement of counsel was read to the jury:

1st. William A. Maxwell testified that he rented the "Philemea old town" place of Shotwell, and cultivated it year, (?) and Nicholas Wiley took possession the last of and he has occupied it ever since; that witness never

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ly of the numbers of the land forming the "Philemea old own or Shotwell place." Witness does not know whether he ever had possession of lot number two hundred and twenty-nine or not.

2d. Winson H. Walden testified that lot number two hundred and twenty-nine was a part of Wiley's "Philemea old own" place; witness never knew the place until 1854.

3d. Wiley Mitchell testified that in March 1845 he was working on boxes to freight his cotton, and he then saw acts of ownership, as the signs of timbers for boxes having been cut on number two hundred and twenty-nine; that there was then a fence of Wiley's inclosing from five to ten acres of lot number two hundred and twenty-nine; that this fence inclosed a pond, which, if the fence had continued straight on, the line dividing two hundred and twenty-nine and two hundred and thirty would have passed through the pond; that there was no land of two hundred and twenty-nine inclosed which was fit to cultivate; that witness asked Wiley's overseer why he made the fence around the pond, who replied, that it was to avoid going through the water; that he did not wish to go through deep water; that it was Wiley's land anyhow;" that in 1847 the whole lot was inclosed as a hog pasture. Witness, at the instance of Mr. Walden a year ago, examined the lines and corner-posts, and from this examination he testified to the numbers; that Wiley's fence has remained as in 1845, around the pond, up to the last time he saw the place; that it is a poor lot of land; there was no cultivated land between the fence and the water; the pond was too deep for the fence to go through it. Witness never saw the land until 1845; did not see it again until 1847, and it was then used as a hog pasture; the pond covered from five to ten acres of water on two hundred and twenty-nine; the line between two hundred and twenty-nine and two hundred and thirty passed nearly through the centre of the pond; the inclosure around the pond was all the fence or inclosure on the lot two hundred and twenty-nine, prior to 1847.

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Plaintiff then introduced the depositions of John M. Smith, as follows: Witness was on lot two hundred and twenty-nine in the year 1847, about the 1st of March; he examined the lot very carefully; there was no clearing, house, field or occupant upon the lot; Nicholas Wiley examined the lot with witness; Wiley said "there was no house or field upon it at that time, but that he intended to fence said land the next fall" after witness was there; witness has not seen the land since 1847; the reason that witness examined the land carefully in 1847 was because he had a power of attorney from Joseph R. Shipp, authorizing witness to dispose of the same; witness does not know by whom said land was cleared, if it was cleared at all; in 1847 Nicholas Wiley told witness that "he had bought the land from a man named Shotwell, and that he would fence it the next fall." Joseph R. Shipp was to pay witness whatever he charged if he effected a sale of the land; witness was never paid anything for his services; witness ascertained the number of the lot as follows: He had the plat and grant with him, and Nicholas Wiley showed witness the corner, and the number on the corner corresponded with the numbers on the plat and grant; the lot and corner were shown to witness by Mrs. Wiley; Nicholas Wiley told witness it was lot two hundred and twenty-nine, and showed him the numbers "229" on the corner; witness has no hesitancy in saying that was the lot in dispute between the parties.

Plaintiff introduced the depositions of Thomas J. Asher, as follows: Some time in the month of June, 1849, witness went to see said lot for the purpose of selling it under a power of attorney; went to Wiley's house, who lived in the neighborhood of said lot; does not remember Wiley's given name; Wiley pointed out the lot and the station trees; Wiley said it was his land; there was no clearing on said lot; the lot was inclosed with a new fence; witness examined it carefully; there was no house on it; with the exception of the new fence, it was in a wild and uncultivated condition; Wiley said he fenced said lot for a hog pasture; did not make

examination of my own accord; was sent, or rather requested to do it by plaintiffs; had witness sold the land, would have charged for his trouble, though when witness arrived here, examined the lot, and saw that Wiley was trying to steal or take it from plaintiffs, they being poor, witness made no charge.

The jury, under the charge of the Court, returned a verdict for the defendants, and plaintiff moved for a new trial, upon the following grounds, to-wit:

1st. Because said verdict is contrary to the evidence.

2d. Because said verdict is contrary to the charge of the Court, as follows: "That the defendant must show a public, open, notorious and continuous possession for the full space of seven years before the day of filing the suit, to sustain the statute of limitations, or his title under it, and that defendants must make out their case clearly and distinctly."

3d. Because, on the trial of said case, the plaintiff objected to so much of the testimony of Wiley Mitchell as was heard, and gave the sayings of Wiley, the defendant, and of his overseer, and the Court overruled the objection, and allowed the whole of said testimony to go to the jury.

4th. Because the Court refused to charge the jury as follows: "That the statute of limitations does not run against the right of a married woman to land during her coverture, and that if it is proven that plaintiff's lessor, Elizabeth Shipp, is a married woman, her right cannot be barred by the statute;" "that the mere running of the fence down the lines of two hundred and thirty and two hundred and twenty-nine, until it met the pond, and running around the same because it was too deep to run the fence through, will not be sufficient possession of the lot, for the statute to begin to run from that time;" and charged in lieu thereof as set forth in the 5th ground.

5th. Because the Court erred in charging the jury as follows: "That if Wiley inclosed with his fence, under a claim of title, five or ten acres of the pond on lot two hundred and twenty-nine, in running down the lines between lots two

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hundred and twenty-nine and two hundred and thirty, (claiming lot two hundred and twenty-nine,) and remaining in adverse possession seven years before suit brought, it is such possession as will support the statute of limitations, and if seven years elapsed the jury must find for defendants; if Wiley in 1845 placed the fence on lot two hundred and twenty-nine by mistake, inadvertance or ignorance of the true line, the statute would not commence to run."

The motion for a new trial was overruled upon each of the grounds taken, whereupon plaintiff excepted and assigns said rulings as error.

HINES & HOBBS, for plaintiff in error.

VASON & DAVIS; W. A. HAWKINS, represented by R. F. LYON; G. W. WARWICK, for defendants.

WARNER, Chief Justice.

This was an action of ejectment on the several demises of Elizabeth Warmick, Joseph R. Shipp, and of Shipp in right of his wife, who had intermarried with Elizabeth Warmick, the donor of the land, against the defendants to recover the possession of lot number two hundred and twenty-nine in the first district of Lee county. On the trial the jury found a verdict for the defendant. A motion was made for a new trial on the several grounds specified in the record, which was overruled by the Court, and the plaintiff excepted. The defense relied on by the defendant was the statute of limitations. The land was granted to Elizabeth Warmick on the 13th December, 1836. Joseph R. Shipp intermarried with Elizabeth Warmick on the 31st January, 1833. This suit was commenced on the 1st day of May, 1853. The defendant claimed a title to the lot of land under a deed made by Shotwell, dated 11th November, 1836. Wiley took possession of the settlement of land purchased of Shotwell, in which it is claimed the lot in dispute constituted a part.

of,) the latter part of the year 1836, and has occupied it ever since.

Wingfield testified that in March, 1845, he saw such acts of ownership on the lot as the sign of timbers for cotton having been got, and that there was a fence of Wiley's signifying from five to ten acres of the lot in dispute, that the fence inclosed a pond while the fence of Wiley, if it continued straight on the line dividing lots two hundred twenty-nine and two hundred and thirty, would have passed through the pond. Witness asked Wiley's overseer if he made the fence around the pond, who answered that he did so to avoid going through the water, that he did not wish to go through deep water, that it was Wiley's land anyhow.

The portion of the witness' answer as to what Wiley's overseer said was objected to and the objection overruled, which was signed as error. The materiality of this evidence is not apparent in regard to the main question of possession. Wiley's fence was upon the land, and the statement of his overseer only gives the reason why it was there; that reason does not alter or change the location of the fence on the lot in dispute. But we think this statement of the overseer of Wiley, who was in possession of the land at the time, managing his property for him as his agent, was competent to establish the adverse possession of Wiley: Code, sections 3721, 3722. Shipp, as the husband of his wife, by virtue of his legal rights under the law as it existed at the time of the commencement of this suit, had the legal right to sue for the land and to reduce the same to possession as his property, according to the ruling of this Court in *Prescott & Pace v. Mes & Peavy*, 29 *Georgia Reports*, 58, he was the only one who could legally do so, as the title was in him, and not in his wife. The mistake of the plaintiff in error is in the assumption that, under the law as it then existed, that the wife had a *separate estate* in the land, independent of the legal rights of her husband, against which the statute of limitations did not run during her coverture. In view of the facts of this case, as disclosed by the record, and the

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charge of the Court to the jury as to the law applicable thereto, we find no error in the refusal of the Court to grant a new trial: See *Wiley vs. Warmock et al.*, 30 *Georgia Reports*, 701.

Let the judgment of the Court below be affirmed.

JOHN H. WALTON, plaintiff in error, vs. JACKSON M. GILL, administrator, defendant in error.

JAMES LEONARD *et al.*, plaintiffs in error, vs. JACKSON M. GILL, administrator, defendant in error.

WILLIAM J. WEEKES, executor, plaintiff in error, vs. JACKSON M. GILL, administrator, defendant in error.

Where an executor is sued as such, in the county of his residence, and, pending the suit, dies, and administration, *de bonis non*, is granted upon the estate of his testator, who lived and died in a different county, to a citizen of the county of the testator's residence, the suit against the executor does not abate, and a *scire facias* issued to make the administrator *de bonis non*, a party to the suit, should not have been dismissed under the facts stated.

Jurisdiction. Venue. Administrator *de bonis non*, cum *testamento annexo*. Before Judge JOHNSON. Talbot Superior Court. March Term, 1872.

The three above cases, involving the same point, were heard and decided together. The plaintiffs in error brought suits against A. G. Perryman, as executor of James Perryman, deceased, to the Superior Court of Talbot county. When the cases were called, the following facts were made to appear to the Court: That said A. G. Perryman departed this life in 1869; that his death had been duly suggested of record and *scire facias* served on Jackson M. Gill, as administrator *de bonis non*, cum *testamento annexo*, upon the estate of said James Perryman, requiring him to show cause why he should

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he made a party to said suits; that James Perryman, at time of his death, was a citizen of Marion county; that will was proved by A. G. Perryman and letters testatory issued in said county; that the said A. G. Perryman and had always been, a citizen of the county of Talbot; the said Gill, since the death of the said A. G. Perryman, had been appointed administrator *de*, etc., upon the estate of said James Perryman; that said Gill was, and had always been a citizen of the county of Marion; that *scire facias* had been served upon said Gill by the sheriff of Marion county. Upon this showing, plaintiffs in error moved to have said Gill, as administrator, as aforesaid, made a party defendant to each of said causes.

Upon objection made, the motion was overruled and plaintiffs in error excepted and assign said ruling as error.

H. WORRILL; M. BETHUNE; G. N. FORBES, for plaintiffs in error.

ANDFORD & CRAWFORD, for defendant.

MONTGOMERY, Judge.

It is very clear that the action against an executor or administrator, as such, does not abate on his death, as a general rule, if his successor is made a party by *scire facias*: Code, §§ 3375, 3380. It is equally clear that the policy of our courts is a general rule, against abatement of actions for any

reason. Under statute law, then, the suit in this case does not abate and the question is narrowed to the inquiry, does it survive the death of the defendant by virtue of the 7th paragraph, section 12, Article V., of the constitution. That section, after enumerating what cases may be brought out of the county of a defendant's residence, "all other cases shall be tried in the county where the defendant resides;" grammatically, resides at the place where he is tried. Suppose he removes out of the county; does the suit follow him to his new home, to be tried there? *See* *supra*, p. 39.

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there "tried?" If the letter of the Constitution is to be adhered to, yes. What difference, in principle, is there between the case supposed and the case at bar? None is perceived.

Judgment reversed.

THE WESTERN AND ATLANTIC RAILROAD, plaintiff in error,
vs. PETER C. HARRIS, defendant in error.

Where a set of interrogatories was tendered in evidence, and it appeared, from inspection, that the commissioners had taken the answers of the witness as required, that he had sworn to and subscribed to them, that the commissioners had duly attached their names to a proper certificate; that after this the commissioners had permitted the witness to add to his answers, adding a new *jurat* and a new certificate, but it did not affirmatively appear that the addition was at the same time and place, and a part of the same transaction:
Held, That the addition was not properly a portion of the return.

Interrogatories. Before Judge HOPKINS. Fulton Superior Court. October Term, 1871.

Peter C. Harris brought case against the Western and Atlantic Railroad for \$5,000 damages, alleged to have been sustained by plaintiff by reason of the negligence and carelessness of the defendant in the transportation, as a common carrier, of a blooded stallion by the name of "Brattleboro," from the city of Atlanta to the town of Kingston, along the line of said railroad, by which said stallion was permanently injured.

Upon the trial the depositions of Julius A. Peck, L. C. Stone, Augustus R. Jones, and Peter C. Harris, taken under one commission, were introduced in evidence for the plaintiff. The commission was executed on the 7th day of August, 1871, in the usual form. Under the *jurat*, attached to the answers, was the following language, to-wit:

"For further answer to sixth interrogatory, P. C. Harris

s: This horse 'Brattleboro' belongs to that family of renowned trotting horses, known as the Morgan breed, which ('Dexter') was sold to Bonner for \$30,000. 'eboro' is, or was remarkable for his speed, action and nd, as a stallion, ought to command as much as 'Dex- any other horse. I am confident that if this horse leboro' had not been injured, he could have commanded or fifty mares, at \$40 each, per season, and the said when injured, was worth not less than \$3,000. I prefer raising from him to any horse living.

(Signed)

"PETER C. HARRIS.

ered, sworn to and subscribed

re us, 7th April, 1871.

1) "W. F. TURNER, Com'r. [L. s.]

"JOY F. THOMPSON, Com'r. [L. s.]"

r the answers were read the defendant moved to ex- all of the aforesaid addition from the consideration of y. The motion was overruled. The jury returned a for the plaintiff for the sum of \$3,000 principal, and 50 interest.

defendant moved for a new trial upon the following l, to-wit:

use the Court erred in not excluding, on defendant's , all that part of the answers of Peter C. Harris, which en answered after the formal execution of the commis- ie signature of all the witnesses and of the commis- , the commissioners having no power to continue or the examination after such formal closing.

motion was overruled and defendant excepted, and as- aid ruling as error.

T. BLECKLEY; HULSEY & TIGNER, for plaintiff in

ARNOLD; E. N. BROYLES, for defendant. 1. The ex- was not taken in writing and notice given: Code, sec.

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3835. 2. Objection invalid, if in time: 33 Ga. R., 55; *Ibid*, 122.

McCAY, Judge.

This case turns upon but one point. Was it error in the Court to refuse to rule out the addition made by the commissioners? We are not prepared to say that the power of the commissioners is exhausted when they have once examined the witness and affixed their signatures to the certificate. Under proper circumstances they may have a right to set down additional answers. But in our judgment it must affirmatively appear that the additional answer is taken as part of the original transaction, at the same time and place. The other side has a right to ask, for instance, and know who is present at the taking of the answers, and if the commissioners may, at their pleasure, re-examine the witness it would be easy to evade such questions. We think this addition formed no legal part of the commissioners' report, because it failed to show that it was taken at the same time and place, and as part of the principal examination. It is of the utmost importance that every possible guard be thrown around this kind of testimony to avoid imposition, and very rigid rules ought to be held to. We the more readily grant the new trial in this case, because, although we do not suppose there was any fraud by the commissioners, yet the verdict is a very heavy one under the proof, and it is clear that the interests of the State have not been properly seen to on this trial. We know this was not the fault of the attorneys now representing the State, but it is very apparent that somebody is to blame.

Judgment reversed.

7. JONES, plaintiff in error, vs. ASBURY A. ADAMS,
defendant in error.

re has not been personal service on the defendant in a suit on
account, the plaintiff must prove his claim to the satisfaction
Court by competent testimony before he is entitled to a judg-
though no issuable defense has been filed on oath. (R.)

ment Service. Account. Before Judge CLARK.
Superior Court. October Adjourned Term, 1870.

ie facts of this case, see the decision of the Court.

R. WORRILL, for plaintiff in error.

GOODE, for defendant.

NER, Chief Justice.

was a motion to set aside a judgment in the Court
which had been obtained on an open account, without
of of the account before the Court, the defendant not
een *personally* served, and the sheriff's return showing
defendant had been served by leaving a copy at the
it's residence. The Constitution of 1868 declares,
Court shall render judgment without the verdict of
n all civil cases founded on *contract*, where an issua-
se is not filed on oath, but the Court must have be-
satisfactory evidence of *the contract*. The 3405th
of the Code declares, that in all cases of suits on open
in the several Courts of this State, where the writ
ss has been served *personally*, as the law now directs,
efendant, and there is no defense made by the party
her in person or by attorney, at the time the case is
xl for trial, the plaintiff shall be permitted to take a
as if each and every item were proved by testimony.
iere has not been *personal* service of the writ or pro-
he defendant in a suit on an open account, the plain-
t prove his account to the satisfaction of the Court,

Mayer & Lowenstein vs. The Chattahoochee National Bank.

by competent testimony, before he is entitled to a judgment, although no issuable defense has been filed on oath. An open account is not such a contract as the Constitution contemplates. To authorize the Court to render judgment without proof on an open account, there must have been *personal* service of the writ or process on the defendant.

Let the judgment of the Court below be affirmed.

MAYER & LOWENSTEIN, plaintiffs in error, vs. THE CHATTAHOOCHEE NATIONAL BANK, defendant in error.

A return of a sheriff upon a writ of attachment, which states that he served a named person "personally" with a summons of garnishment, may be amended so as to show that he served such person as president of a bank. If the summons of garnishment has been lost, and the sheriff is dead, the plaintiff, on motion to do so, should be permitted to prove by *aliunde* testimony that the summons of garnishment was directed to the person served as president of the bank. If the garnishee denies it, he can tender an issue, which, if found in favor of the plaintiff, will entitle him to an order amending the return, "so as to make the proceedings conform to the facts."

Garnishment. Amendment. Return. Before Judge JOHNSON. Muscogee Superior Court. May Term, 1872.

Mayer & Lowenstein commenced suit against a firm doing business under the name of McKee Brothers, and sued out process of garnishment for the purpose of having the same served on the Chattahoochee National Bank. When the cause was called Messrs. Moses, Ingram & Crawford, without appearing for the bank, moved that the suit against the garnishee abate on the ground that the bank had not been served, and exhibited to the Court two returns of the sheriff made at different times, each stating that he had "served" the summons of garnishment personally upon H. H. Epping. Plaintiffs proposed to prove that the summons of garnishment were directed to H. H. Epping as president of the

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d moved, on such proof, to have the returns amended. The Court ruled that the sheriff might amend his return if he so desired, but refused to allow the proof. It was submitted that the sheriff who made the returns was mistaken and that the summons of garnishment were lost. The Court sustained the motion of Messrs. Moses, Ingram & Crawford, and ordered that the proceedings of garnishment against said bank do abate. To which ruling counsel for the defendants excepted and now assign the same as error.

BY L. BENNING; GRIGSBY E. THOMAS, for plaintiffs.
The return was amendable by parol evidence: sections 3447, 3456; 36 Ga. R., 602; 16 *Id.*, 198; 19 Ga. R., 198. For every right there shall be a remedy: Code, sections 3185, 3447; 16 Ga. R., 198.

MOSES; INGRAM & CRAWFORD, for defendant.

GOMERY, Judge.

In this case controlled by sections 3456 and 3447 of the Code, and, as we understand those sections, they command to reverse the judgment of the Court below. Our decision is fully set forth in the head note. The judgment is reversed.

[KENDALL *et al.*, plaintiffs in error, vs. MARY DOW, defendant in error.

property is levied on which is claimed by complainant was removed from the lien of the execution by a written contract, and the said agreement are ambiguous, and the affidavits as to the facts of the parties, read on the hearing of the motion for injunction, conflicting, this Court will not interfere with the discretion of the Chancellor granting an injunction. (R.)
The Court will not interfere by injunction where it will prevent a multiplicity of suits and quiet the title to a number of lots of land by one final decree. (R.)

Kendall et al. vs. Dow.

Injunction. Release of lien. Multiplicity of suits. Cloud on title. Before Judge STROZIER. At Chambers. June 8th, 1872.

Mary Dow filed her bill against John M. Kendall and C. R. Collins, sheriff of Mitchell county, containing the following material allegations: That complainant, a resident of the city and State of New York, is the sole heir of John M. Dow, late of said city and State, who recently died intestate; that an administration upon the estate of said John M. Dow is unnecessary, as there are no debts due by said estate; that John M. Kendall brought assumpsit against one William W. Cheever, to the Term, 185..., of the Superior Court of Dougherty county, upon which a verdict for plaintiff was rendered at the Term, 1857, for \$....., upon which an appeal was entered by said Cheever; that upon the appeal trial, a verdict was rendered for the plaintiff for \$.....; that a new trial was awarded by the Supreme Court; that the case was pending for trial at the June Term, 1870, of said Court; that Cheever died on day of, 1863, and George H. Cheever, his administrator, had been made a party defendant; that, under the decision of the Supreme Court, plaintiff would have been unable to have made out his case; that George H. Cheever, administrator as aforesaid, was a non-resident, and was represented by Hines & Hobbs, as his attorneys; that John M. Dow was also a non-resident, and was represented by the same attorneys; that William W. Cheever had, by deeds, conveyed to said John M. Dow, for a cash consideration, large amounts of lands, and amongst them the lots, for the protection of which this bill is filed; that these deeds were recorded in the county of Baker, within the twelve months allowed by law; that the county of Mitchell was carved out of the county of Baker after the recording of said deeds; that the deed to the land in dispute was made subsequent to the first verdict in the case of John M. Kendall vs. William W. Cheever; that Thomas S. Metcalf also purchased from said W. W. Cheever certain city

the title to which was subsequent to said verdict; that said Metcalf had died, having in his lifetime employed Messrs. Hines & Hobbs as his attorneys; that negotiations were opened between the parties interested for a settlement, which resulted in the following contract:

"GEORGIA—DOUGHERTY COUNTY:

"JOHN M. KENDALL vs. WILLIAM W. CHEEVER—Complaint in Dougherty Superior Court.

"Whereas, the plaintiff in the above stated cause, heretofore, to-wit: at the Term, 185..., of the Superior Court of Dougherty county, obtained a judgment at common law against said W. W. Cheever, and on which judgment an appeal was entered by said defendant, which is still pending in said Court, and, whereas, the lien of said common law judgment is supposed to bind certain property hereinafter more fully set forth; this agreement, entered into this 11th day of August, 1870, between Hines & Hobbs, attorneys representing the estates of T. S. Metcalf, John M. Dow and themselves of the one part, and R. N. Ely and Vason & Davis, attorneys representing John M. Kendall of the other part:

"Witnesseth, that said plaintiff, for and in consideration of the sum of \$1,000 to be paid as is hereafter set forth, shall, upon said payment, relinquish the lien of said common law judgment on the said property hereinafter described, which said \$1,000 shall be paid as follows, the same to be raised from the sale of a portion of the city lots belonging to the estate of said Metcalf, one half cash, the other half in notes of the purchasers of said lots to be sold, with interest from date of sales, and to be due twelve months after date, and in consideration of said relinquishment of said common law judgment, the said Hines & Hobbs agree to have their names stricken from the defense of said cause at the next term of Dougherty Superior Court, and allow the plaintiff to either take a verdict for the amount of the last verdict obtained in said cause, or to dismiss the appeal as plaintiffs

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counsel may see fit. If the appeal is dismissed the first verdict obtained shall be reduced by remission to the amount of the second verdict. If other parties should come in to defend said cause, said Hines & Hobbs shall not be bound to see that the verdict is taken, they simply stipulate that they will not represent the defense; they further agree, in consideration of said relinquishment of said lien, when the sum is raised from the sale of lots, to pay said plaintiff's attorneys the said sum of \$500 in cash, and notes of said purchasers as aforesaid for \$500, upon the payment of which to plaintiff's attorneys the said lien of said judgment shall be forever released and satisfied on the following property, to-wit: all that property conveyed by W. W. Cheever to Thomas S. Metcalf, by deed, which is of record in the Clerk's office in Dougherty Superior Court, city lots forty-two, forty-four and eighty-four on Broad street, Albany, Georgia, and all those lots conveyed by W. W. Cheever and C. H. Parmalee to John M. Dow, all of which said deeds are of record.

"It is further understood and agreed that said sale of lots shall take place by or before the first day of November next. This August 11th, 1870.

(Signed,)

"HINES & HOBBS,
Att'ys for T. S. Metcalf *et al.*

"VASON & DAVIS,
Att'ys for Kendall."

Complainant charges that by said contract it was distinctly agreed and covenanted, that if all opposition to said case going to judgment was withdrawn, all lands conveyed by William W. Cheever and Charles H. Parmalee to said Metcalf or said Dow should be discharged from the lien of said common law judgment; that said contract is specific and positive in its character, and free from any ambiguity or doubt, and distinctly meant and was intended to cover lands sold by said William W. Cheever and Charles H. Parmalee, or either of them; that said agreement was acted upon and completed with, and all opposition to said case withdrawn; that

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Kendall, after obtaining judgment, in violation of his said agreement, has caused the *fi. fa.* based upon the same to be taken to Mitchell county, and has had it levied upon said lots, and, unless restrained, will sell the same; that complainant being a woman and a non-resident, and having no acquaintance in the State of Georgia, is unable to give security required by law to interpose a claim; that said lots levied on are worth at least \$10,000, more than twice the principal and interest due upon said *fi. fa.*, which she is willing the Court shall hold subject to any damages said Kendall may recover by reason of delay; that said Kendall is unable to respond to damages for the loss that will accrue to complainant if said lots are sold; that said Kendall, by the violation of his said agreement, has cast a cloud upon complainant's title; that complainant is willing to abrogate said contract upon being placed in the position she occupied at the time it was entered into; pray, that the said *fi. fa.* be perpetually enjoined as to all lands conveyed unto John M. Dow by said William W. Cheever and Charles H. Parmalee, or either of them; that the levy by C. R. Collins, sheriff, be enjoined from proceeding to sale; that said contract be fully enforced; that the writ of *habeas corpus* may issue; complainant waives all discovery.

The defendant, John M. Kendall, answered said bill, substantially, as follows, to-wit: Defendant denies that, under the decision of the Supreme Court in the case of *John M. Kendall vs. George H. Cheever*, administrator, he would have been unable to recover; defendant had no knowledge that in the settlement set forth in said bill John M. Dow was a party; that he has no recollection of any negotiations in relation to his interests or rights; that said Dow made no commission or payment to release his property from the lien of said judgment; that it was unknown to defendant and his counsel that said Dow was the owner of the lands levied on; that he understood that Messrs. Hines & Hobbs, in said negotiations, only represented said George H. Cheever, administrator as aforesaid, and the estate of Thomas S. Metcalf, which said latter estate held a considerable number of city

lots in Albany, which were subject to the lien of said judgment; that the agreement for the release of said property was made for the consideration therein stated; that before said contract was entered into, R. N. Ely, Esq., one of defendant's counsel, had a memorandum letter from the records of the Superior Court of Dougherty county, showing that Parmalee & Cheever conveyed to said John M. Dow, on October 15th, 1858, lots of land numbers thirty, thirty-one, fifty, fifty-one, fifty-two and seventy-one in the first district of said county, which was subsequent to said first judgment; that when the agreement was prepared by Messrs. Hines & Hobbs the stipulation was inserted therein releasing the lien of said judgment, not only on the property conveyed to said Metcalf, but also on "all those lots conveyed by W. W. Cheever and C. H. Parmalee to John M. Dow;" that this stipulation would have been rejected had it not been that Charles H. Parmalee was interested therein, and it was considered a small matter from the fact that said lands were of but little value, and there being other property more than sufficient to pay respondent's debt; defendant denies that John M. Dow was a party to said negotiations, or contributed anything, or paid any consideration whatever for the agreement of this defendant to release the lien of said judgment on his property; that said agreement was only intended to cover the lands jointly conveyed by W. W. Cheever and C. H. Parmalee, situate in the county of Dougherty, and set forth in said memorandum; that said contract was not intended to include, and does not include, the lands levied on, for it was then unknown to defendant or his counsel that said lands were ever owned by W. W. Cheever, or that he ever sold them; that said lands lie in Mitchell and not in Dougherty county, and were not conveyed by said Cheever & Parmalee to Dow, but only by W. W. Cheever to said Dow; that defendant is not insolvent; that John M. Dow was never a party to the case of *Kendall vs. Cheever*, administrator, and that no one else but said Cheever, administrator, did or could make any defense thereto; that Messrs. Hines

Hobbs assured this defendant that said agreement made with said Metcalf, as set forth, did not and would not prevent this defendant from making his money out of any of the property that had been sold by said Cheever since said verdict, excepting that released by him; that said Hines

Hobbs said that the reason that they had to make said arrangement was to enable them to sell Metcalf's lands in Albany, and that the estate of Metcalf was willing to pay \$10,000, to attain this end.

Defendants filed also a demurrer to said bill. The motion for injunction and the demurrer were, by consent, heard together. Affidavits were read sustaining both the bill and answer. The demurrer was overruled and the writ of injunction ordered to issue as prayed for; whereupon defendants excepted, and assigns said rulings as error.

R. N. ELY; VASON & DAVIS, for plaintiffs in error.

HINES & HOBBS; G. J. WRIGHT, for defendant.

WARNER, Chief Justice.

This was a bill filed by the complainant as the sole heir-at-law of John M. Dow, against the defendant, praying for an injunction to restrain the sale of twenty-six lots of land in the county of Mitchell, which had been levied on as the property of Cheever to satisfy a judgment obtained in favor of Kendall vs. Cheever. After hearing the parties on a rule to show cause the Court granted the injunction prayed for in complainant's bill; whereupon the defendant excepted. It appears from the record in this case, that prior to the 11th day of August, 1870, that Kendall, the defendant, had obtained a common law judgment against the administrator of William W. Cheever, which bound the property of said Cheever, for the payment thereof, including the lands now levied on in the county of Mitchell, which lands had been conveyed to Dow, the complainant's intestate, by William W. Cheever, in his lifetime, for a valuable consideration. On the 14th day of August, 1870, Messrs. Hines & Hobbs, the attor-

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neys of John M. Dow *et al.*, and Messrs. Vason & Davis, the attorneys of Kendall, entered into a written agreement for the settlement and adjustment of the claims of the respective parties represented by them as attorneys at law in the case stated. The preamble to the agreement recites, after stating the case of John M. Kendall *vs.* William W. Cheever, complaint in Dougherty Superior Court, that whereas, the plaintiff in the above stated case heretofore, to-wit: at the Term, 185..., of the Superior Court of Dougherty county, obtained a judgment at common law against said W. W. Cheever, on which judgment an appeal was entered by said defendant, which is still pending in said Court, and whereas, the lien of said common law judgment is supposed to bind certain property hereinafter set forth." The agreement then provides that in consideration of the payment of \$1,000, that the plaintiff may take a verdict for the payment of the last verdict obtained in said cause or dismiss the appeal, as plaintiff's counsel may see fit. In consideration of the payment of \$1,000, to be raised and paid as stipulated in the agreement to said plaintiff's attorneys, the said lien of said judgment shall be forever released and satisfied on the following property, to-wit: all that property conveyed by W. W. Cheever to Thomas S. Metcalf by deed which is of record in the Clerk's office in Dougherty Superior Court, city lots forty-two, forty-four and eighty-four, on Broad street, Albany, Georgia, and all those lots conveyed by W. W. Cheever and C. H. Parmalee, to John M. Dow, all of which said deeds are of record. The question in dispute between the parties is, whether by a fair construction of this agreement it was the intention of the parties to it that the lien of Kendall's judgment against the property of W. W. Cheever, in consideration of the payment to him of \$1,000, should be released and satisfied as to all the lots of land conveyed by W. W. Cheever, by deed, to John M. Dow, (including the lands in Mitchell county,) or whether it was the intention of the parties to relinquish the lien of Kendall's judgment, only to such lots of land as had been jointly conveyed by Cheever and Parmalee to Dow. On

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hearing of the motion for the injunction several affidavits were read in evidence to the Court, including the affidavits of the attorneys who made the agreement as to what was the meaning placed on the contract by the parties, and understood by them, at the time it was made, under the provisions of the 2714th section of the Code. Upon this point in the case the evidence was *conflicting*.

It was manifestly the intention of the parties to release and satisfy the plaintiff's judgment lien on Cheever's property, and the words of the agreement are broad enough to cover all the lots of land conveyed by Cheever to Dow by deeds, then of record, as well as all the lots conveyed by Parmalee to Dow by deeds of record, unless it was the intention and understanding of the parties at the time that the release of the lien of the plaintiff's judgment should only extend to such lots of land as were conveyed *jointly* by Cheever and Parmalee to Dow. Parmalee does not appear to have been a party to the suit which was the subject matter of the settlement. The subject matter of the settlement was the release and satisfaction of the plaintiff's judgment lien against the property conveyed by Cheever, and if it was the intention and understanding of the parties to the agreement that the relinquishment of the plaintiff's judgment lien should be *restricted* and confined only to such lots of land as were *jointly* conveyed by Cheever and Parmalee, that is a question of evidence which should be submitted to the jury on the final hearing of the cause.

In our judgment, the words of the agreement, when considered in relation to the subject matter of it, do not *necessarily* require the construction insisted on by the plaintiff in error. In view of the statement of facts alleged in the complainant's bill, her remedy in a Court of law would not be as adequate and complete as in a Court of equity; it will prevent a multiplicity of suits by quieting the title to a number of lots of land by one final decree, and remove a cloud from her title, if the allegations in her bill be true.

Let the judgment of the Court below be affirmed.

New vs. LeHardy.

MARTIN NEW, plaintiff in error, vs. CAMILLE LEHARDY
defendant in error.

1. The written notice required by section 3987 of the Code, to be given by the plaintiff in *certiorari* to the opposite party in interest, need not appear of record, if there is a waiver in writing of the notice.
2. Under section 3956 of the Code, a possessory warrant lies at the instance of the party injured, in two classes of cases: First, where any personal chattel has been taken, enticed or carried away, either by fraud, violence, seduction or other means from the possession of the party complaining. Secondly, where such personal chattel, having recently been in the quiet, peaceable and legally acquired possession of the complaining party, has disappeared without his consent. In the first class of cases no lapse of time will bar the plaintiff's right to recover, if he makes out his case in other respects, where the defendant fails to show that such property has been in his quiet and peaceable possession for four years next immediately preceding the issuing of the warrant, or, perhaps, in the quiet and peaceable possession for that length of time, of those under whom he claims.

Certiorari. Notice. Possessory warrant. Statute of limitations. Before Judge GIBSON. Richmond Superior Court January Term, 1872.

Martin New sued out a possessory warrant for a horse in the possession of Camille LeHardy. The case was tried before Richard W. Maher, a Justice of the Peace, on May 13th, 1871.

The evidence disclosed that plaintiff was in possession of the horse at Shultz Hill, in South Carolina, in May, 1865; that the horse was taken about that time from his possession, without his knowledge or consent; that plaintiff next saw the horse in possession of defendant in Augusta, Georgia, some two weeks before the trial, and demanded possession on May 3d, 1871; that defendant purchased the horse in Rome, Georgia, in July, 1870, and had been in possession ever since.

The Justice of the Peace awarded the possession of the horse to the plaintiff. The defendant carried the case, by writ of *certiorari*, to the Superior Court of Richmond county. When the case was called, the defendant in *certiorari* moved to dismiss the writ, because written notice of the sanction

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he petition for *certiorari*, and of the time and place of hearing, had not been given to said defendant. It was admitted by defendant that a waiver, in writing, of said notice had been taken by plaintiff in *certiorari*, but he insisted that the writ should be dismissed, because the waiver did not appear of record. The motion was overruled by the Court and defendant excepted.

The Court rendered the following decision: "The *certiorari* in this case is sustained, and the judgment and order of the magistrate in the Court below, ordering the property into the possession of Martin New, he not having been recently in the possession of the horse, nor shown a clear right to the same, is set aside and reversed."

The defendant excepted to the said judgment and assigns the rulings aforesaid as error.

MARCELLUS P. FOSTER, represented by H. CLAY FOSTER, for plaintiff in error. 1st. The refusal of the Court to dismiss the *certiorari*, on the ground that it did not appear from the record that the notice required by law had been given or waived, was error: Code, section 3987; Pamphlet Decisions Sup. Ct. Ga., 1871, p. 78, last publication; L. J. Glenn & Son vs. Wm. C. Shearer *et al.* 2d. The Court erred in sustaining the *certiorari*, on the ground that it did not appear that the plaintiff was recently in the possession of the property claimed: Code, sections 3956, 3961; 22 Ga., 319, 321. 3d. The Court erred in sustaining the *certiorari*, on the ground that the decision of the Justice was unsupported by evidence: 29 Ga., 628; 28th, 484; 28th, 320; 28th, 103; 10th, 503; 18th, 13; 14th, 286; 6th, 276.

SLAIBORNE SNEAD, represented by the REPORTER, for defendant.

MONTGOMERY, Judge.

Judge Lumpkin has somewhere said that a party may have everything, even a trial, by confession of judgment or
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plea of guilty. Surely there is nothing peculiar in the written notice required to be given of the sanction of a writ of *certiorari* that takes it out of so sweeping a rule—the waiver itself being in writing.

2. In this case the plaintiff lost his property some six years before he sued out his possessory warrant. The horse then had not been “recently” “in the quiet, peaceable and legally acquired possession” of the plaintiff. But there is another class of cases in which a possessory warrant will lie, to-wit: where “any personal chattel has been taken, enticed or carried away either by fraud, violence, seduction or other means; from the possession of the party complaining.” In this class of cases no lapse of time will bar the plaintiff if he makes out his case in other respects, unless the defendant shows that he has been in possession for four years next immediately preceding the issuing of the warrant. But the *onus* is on the defendant. Perhaps if he show that he and those under whom he claims has been in possession for that length of time it will suffice. In this case the defendant has shown neither.

Judgment reversed.

JAMES C. COOK, plaintiff in error, vs. THE NORTH AND SOUTH RAILROAD COMPANY, defendant in error.

Where a bill was filed setting up that the complainant had conveyed by deed to a railroad company for laying and using its track, one hundred feet width of the land through his plantation, and trusting to the assurances of the president of the road, that proper stock-gaps should be erected, as they might be needed, had neglected to put in the deed any stipulation as to the gaps, and the bill prayed that the company might be enjoined from running the cars and using the land until the “gaps” were erected:

Held, That the injunction was properly refused by the Judge, though there might be equity in the bill.

Injunction. Railroads. Stock-gaps. Before Judge J. M. GIBSON. Muscogee county. At Chambers. June 8th, 1881.

James C. Cook filed his bill against the North and South Railroad, containing, substantially, the following averments: that said defendant located its railroad through certain inclosed lands of complainant; that when said defendant was out to locate said road through complainant's property, he had William A. McDougald, the president of defendant, rode through said lands and complainant pointed out their situation, connection and fences, and called his attention to the fact that if the railroad should run through said inclosures, it would cause breaks in the fences through which cattle and other animals might pass; that said McDougald then and there assured complainant that defendant would make stock-pens at each and every place where the railroad would cut or strike said fences, and that these assurances were repeated on subsequent occasions; that not long afterwards, the said defendant located its railroad in such a way as to make four intersections of the fences, and, in constructing its road-bed, it made gaps at said intersections through which cattle pass; that said defendant has not constructed stock-gaps at said intersections, and, on the contrary, has refused to construct the same; that when said railroad was located, a question as to the right-of-way arose between complainant and defendant, which was referred to arbitration; that one arbitrator awarded to complainant \$4,000, and the other \$3,000, and before calling in an umpire, submitted their conclusions to complainant and defendant; that complainant and defendant, through its aforesaid president, agreed to dispense with an umpire, and that the award should be for \$3,500, and that the defendant would construct cattle-gaps at the said four intersections, and would also make a crossing for complainant over said railroad at a point above said inclosures, where complainant's mill road crossed; that on September 20th, 1871, relying on the aforesaid assurances, and believing them binding on said defendant, complainant executed a deed to said defendant conveying the right-of-way, one hundred feet wide, through said land; that if the said William A. McDougald, president of defendant, did not believe the assurances and

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promises aforesaid to be valid and binding on said defendant, it was his duty to have communicated this to complainant, and that his neglect to pursue this course was a fraud upon complainant; that in executing said deed, complainant acted on his belief, as above stated, and but for this belief, he would never have made the deed. Prayer, that said defendant be compelled to construct cattle-gaps, as promised; that defendant be enjoined from running cars or engines on said railroad, and from using the same in any way, until said defendant shall have constructed the cattle-gaps, as aforesaid, and shall have permitted complainant to join his fences to the same; that said defendant be enjoined from using said railroad until some bridge or crossing be constructed at the intersection of said railroad with complainant's mill road; that the writ of subpoena may issue.

The answer of defendant is unnecessary to an understanding of the decision of the Court.

On June 8th, 1872, the Chancellor refused the injunction and complainant excepted.

HENRY L. BENNING, for plaintiff in error.

BLANDFORD & CRAWFORD, for defendant.

McCAY, Judge.

We are not called upon to say there is no equity in this bill. Perhaps there is; a jury might find fraud in these proceedings, or breach of confidence. The question before us is, simply, whether the Judge has done wrong in refusing the injunction. Without doubt the complainant is guilty of negligence in not seeing more closely to what he was about, as he does not come before the Court, asking its extraordinary interposition, without fault. Nor does he show any immediate, irreparable, prospective injury as to demand an injunction. The truth is, he is rather seeking, by indirect means, to ask the Court to so act as will *compel* the defendant to build the stock-gaps, a power the Court rarely, if ever,

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ertakes. Besides, though the railroad company is a private corporation, yet it exists for the public good, and to grant this injunction will not only restrain the defendants, but will be a great public evil. It ought to be a strong case to justify the interposition of the Judge to do the thing asked. We do not think this is such a case, and Judge Johnson did not abuse his discretion in refusing the injunction.

Judgment affirmed.

HILLARY B. FRAZER, plaintiff in error, vs. GEORGE T. JACKSON, defendant in error.

bona fide purchaser of the absolute title to personal property without notice of any unencumbered statutory lien upon it takes the same divested of any such lien. Our statutory lien laws secure priority of judgment to favored classes of debts out of certain property of the person who incurred the debts. When such property passes into the hands of a *bona fide* purchaser without notice and before foreclosure, it is no longer the property of the person incurring the debt, and not having gone into the possession of one affected with notice the lien is lost.

Steamboat lien. *Bona fide* purchaser. Before Judge GIBSON. Richmond Superior Court. January Term, 1872.

Hillary B. Frazer instituted proceedings to enforce a lien on the steamboat Wave for personal services rendered on said boat while in the service of the People's Daily Line, a corporation created under the laws of the State of Georgia. The lien was foreclosed and the execution levied upon said boat, which was claimed by George T. Jackson. Similar proceedings were instituted in favor of David A. Philpot and Oliver I. Seago against the steamboat Clyde, which was also claimed by George T. Jackson. The last two cases, by agreement, were to abide the result of the first.

The cases were submitted to the Court upon the following stated statement of facts :

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"That the People's Daily Line owned the steamboats Clyde and Wave, from their construction until May 18th, 1871, when they sold them to William H. Scott; that William H. Scott sold them to George T. Jackson on May 31st, 1871; that Jackson purchased in good faith without any knowledge of the debts due the plaintiffs, Frazer, Philpot and Seago, which are sought to be enforced against the steamboats; that the lien *fi. fas.* of Philpot and Seago were levied upon the steamboat Clyde on July 22d, 1871; that the lien *fi. fa.* of Hillary B. Frazer was levied on the steamboat Wave on September 27th, 1871."

The Court held that the several judgments having been obtained subsequent to the purchase of said boats, there could be no lien to defeat a *bona fide* purchaser for value, and that said boats were not subject to said execution.

To which decision Hillary B. Frazer excepted and assigns the same as error.

BARNES & CUMMING; H. CLAY FOSTER, for plaintiff in error. 1st. The lien attached from the performance of the service: Code, sections 1968, 1969; Acts of 1869, p. 135; 43 Ga. R., 11; Camp & Kemp vs. S. Mayer, assignee, decided July Term, 1872.

FRANK H. MILLER, for defendant. 1. That he can attack the validity of process levied on his property: Phillips vs. Hyde, decided March 12, 1872; 37 Ga., 681; 1st, 317; 30th, 450; 6th, 515. 2. That steamboat liens take effect from date of judgment of foreclosure; 30 Ga., 465; 40th, 540. 3. That the fact being admitted that Jackson owned the boats for some time before foreclosure of liens the same must be illegal, because the allegations in the affidavit, of demand for payment of the president of the People's Daily Line, as owner, is untrue. 4. It is only judgments that have liens on personal property for two years: Code, section 3525. 5. Steamboat liens can in no event last over two months, and where the interest of *bona fide* purchasers, who

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out notice, is affected, the record must show by bill of particulars, or otherwise, when the lien is claimed to have commenced: 6 Ga., 159-170; 7th, 56. 6. A sale under steamboat liens conveys good title as against those who owe the debt, and still own the boat: 40 Ga., 180. 7. Steamboat liens are in derogation of common law, and strictly construed: 1 Kelly, 317. 8. A *bona fide* purchaser of a steamboat, for value, without notice of liens, which were not foreclosed until months after the purchase, will be protected: 39 Ga., 352; 40th, 157, 540; 34th, 454; Code, section 3064; 39 Ga., 18; 41st, 208; 32d, 297; 27th, 515. 9. The persons claiming the liens were the captains and mate formerly running the boats. These are maritime liens, and are not such as are provided for by the Constitution of this State, and which a State Court can enforce. 43 N. Y., 554; 4 Wal., 411, 555; 7 Wal., 624-5; 39 N. Y., 19. 10. All liens upon personal property, not granted by the Constitution, other than judgment liens, are void as against *bona fide* purchasers, who received possession of the property at the time of purchase, without notice of the lien.

MONTGOMERY, Judge.

The facts in this case show the defendant in error to be a *bona fide* purchaser of the steamboats on which the lien has been attempted to be foreclosed, and that he became such before any attempt at foreclosure, without notice of the existence of the debts of his vendors now sought to be enforced against his property. The case, both as to fact and principle, seems to be identical with that of *Rose & Company vs. Gray*, 40 Georgia, 156, and must be controlled by it.

Judgment affirmed.

Hudson *vs.* The State of Georgia.

E. L. HUDSON, plaintiff in error, *vs.* THE STATE OF GEORGIA, defendant error.

A written accusation in the County Court, charging the defendant with employing the servants of another, must state the name of the person in whose employ the servants were at the time of such illegal act, and if the defendant employed the servants by an agent, the name of such agent must be set forth. (R.)

Criminal law. Employing servants of another. Written accusation. Before Judge STROZIER. Dougherty Superior Court. December Term, 1871.

Plaintiff in error was put upon trial in the District Court for Dougherty county upon the following written accusation: "GEORGIA—DOUGHERTY COUNTY.

"Peter McLaren, in the name and behalf of the citizens of Georgia, charges and accuses E. L. Hudson, of the county and State aforesaid, with the offense of misdemeanor. For the said E. L. Hudson, on the 17th day of June, 1871, in the county aforesaid, did, then and there, unlawfully employ by an agent, Watkins Lee, Marshall Jackson, Morgan Hall, they, then and there, being servants and employees of the said estate of Davis Pace, said E. L. Hudson, then and there, knowing that said servants were employed on the estate of Davis Pace, and that their time with the said estate had not expired, contrary to the laws of said State, the good order, peace and dignity thereof.

"Dougherty District Court, July Term, 1871.

(Signed)

"T. R. LYON, District Attorney."

Plaintiff in error moved to quash said written accusation upon the following grounds, to-wit:

1st. Because the name of the agent through which it was alleged he employed said servants was not set forth.

2d. Because the executor's or trustee's name, who had charge of the Davis Pace estate, or the name of the person who had the servants employed was not set forth.

The motion was overruled. The jury, under charge

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Court, returned a verdict of "guilty," recommending plaintiff in error to mercy. Plaintiff in error carried the case by writ of *certiorari*, upon the above and other rulings of the District Court, to the Superior Court of Dougherty county. The Superior Court sustained the rulings of the District Court, and affirmed its judgment, whereupon plaintiff in error excepted, and assigns said decision as error.

HINES & HOBBS; D. H. POPE, for plaintiff in error.

JOHN C. RUTHERFORD, Solicitor General; T. R. LYON, represented by R. F. LYON, for the State.

WARNER, Chief Justice.

This case came before the Court below on a *certiorari* from the County Court of Dougherty county, alleging errors committed by the County Court on the trial of an accusation against the plaintiff in error for employing the servants of another, in violation of the 4428th section of the Code. The Superior Court affirmed the judgment of the County Court, which is assigned for error here. There was a motion made to the County Court to quash the written accusation against the defendant, on the ground that he was accused and charged with employing the servants of another, by an agent, without alleging the name of the agent, and knowing said servants to be in the employ of the "estate of Davis Pace," without alleging the name of any person who had employed said servants on the Davis Pace estate. The offense consists in any person employing the servants of another, either by himself or agent, during the term for which he or she or they may be employed, *knowing* that such servant was so employed, and that his term of service has not expired. The estate of Davis Pace could not have employed the servants, and if any person had employed them to work on that estate, the name of such person should have been alleged. If the defendant employed the servants by an agent, the name of the agent could also be alleged. In our judgment, it was error in the

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County Court in overruling the motion to quash the written accusation against the defendant, and that the Superior Court should have sustained the *certiorari* upon that ground of alleged error.

Let the judgment of the Court below be reversed.

WILLIAM DAVIS, agent, plaintiff in error, vs. D. W. WEAVER, et al., defendants in error.

1. The law places the granting or refusal of injunctions in the sound discretion of the Judges of the Superior Courts; unless that discretion has been manifestly abused, this Court will not control its exercise. We see no abuse of the discretion in the present case, in which the injunction has been partially granted, as asked for. Certainly none of which plaintiff can complain.
2. Upon the hearing of the motion to make an injunction permanent, it is not error in the Chancellor to receive the affidavit of the wife of one of the defendants, in relation to facts not coming to her knowledge from confidential communications of her husband.

Injunction. Discretion. Affidavit. Husband and wife. Before Judge SESSIONS. Pierce county. At Chambers. May 19th, 1872.

William Davis, as agent for, and in right of his wife, filed his bill against D. W. Weaver, D. E. Knowles and E. T. Sweat, containing, substantially, the following allegations, to wit: That defendants, Knowles and Weaver, purchased from Woodard and Sweat, for the sum of \$8,000, a saw mill, fixtures and timber, for the purpose of sawing said timber for market; that after said purchase, Cassie Davis, the wife of complainant, at the instance of said defendant, Weaver and Knowles, through complainant, as her agent, became a partner in said mill, it being agreed that the said business should be carried on in the name of D. W. Weaver, that said firm continued business from January 29th, 1872, to March 1st, 1872, during which time complainant furnished partnership money, provisions and other articles.

amount of \$83 85, also the use of a four mule team and wag-on; that on March 1st, 1872, the said defendants, Weaver and Knowles, without the knowledge or consent of complainant, sold said saw mill property to the defendant, Sweat, for the sum of \$11,000, which was to be paid as follows: Said Sweat to assume the indebtedness of \$8,000, to Woodard and Sweat, for the original purchase of said property, and to give to said firm of D. W. Weaver three promissory notes dated March 1st, 1872, due the first days of May, June and July, 1872, each for the sum of \$1,000; that complainant claims said three notes to be net profits made by said firm on said saw mill property; that since said sale said firm of D. W. Weaver has suspended business, the object of the formation of said firm having ceased to exist; that there is due to complainant one of said promissory notes, or the sum of \$1,000, as his share of the profits of said business; that defendants, Weaver and Knowles, have possession of said notes and of the books and accounts of said firm, and refuse to account; that complainant is unable to obtain a settlement of said partnership business; that defendants are proceeding to collect said partnership notes and to apply the proceeds to their own use; that said defendants, Weaver and Knowles, are insolvent; that complainant is remediless at law; prayer, that Farley R. Sweat be appointed Receiver, to take an account of all the partnership dealings, debts and liabilities, and to pay the same, and after paying said liabilities to divide and pay to each partner of said firm the one-third part of the profits; that said defendants, Weaver and Knowles, be enjoined from transferring the aforesaid notes, and said defendant, Sweat, from paying the same until the further order of the Court; that a full account be had and a decree passed dissolving said co-partnership; that the writ of subpoena may issue.

On April 20th, 1872, the Receiver was appointed and injunction granted by the Chancellor as prayed for in the bill, and defendants required to show cause why said injunction should not be made perpetual.

The answers of the defendants, Weaver and Knowles, de-

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nied that there had ever been any such partnership formed as was set up in the bill; denied the insolvency of Weaver; admitted that complainant had furnished a four mule team and wagon for use at the mill, but alleged that the same had been returned at the time of the sale of said property to said defendant Sweat.

In support of these answers the defendants tendered the affidavit of Charlotte Knowles, the wife of defendant, Knowles. Complainant objected to its admissibility; the objection was overruled and complainant excepted.

The answer of defendant Sweat, based upon the admissions made at different times by the defendants, Weaver and Knowles, sustained the allegations of the bill, except as to defendant's insolvency.

On May 10th, 1872, the Chancellor passed the following order, to wit: "After hearing argument on the within cause as to whether the temporary injunction should be made permanent or not, it is ordered by the Court that the temporary injunction be and is hereby dissolved as to two of the \$1,000 notes, one due on the first day of May, and one on the first day of June of the year 1872. It is further ordered by the Court, that the injunction be and is hereby continued and made permanent as to the \$1,000 note due July 1st, 1872, or until the further order of this Court.

"It is further ordered by the Court, that Farley R. Sweat, be and is hereby appointed Receiver, as prayed for, so far as the \$1,000 note is concerned, due the first day of July, 1872."

To which order complainant excepted, and assigns errors as follows, to-wit:

1st. The Chancellor erred in admitting in evidence the affidavit of Charlotte Knowles, she being the wife of the defendant, D. E. Knowles.

2d. The Chancellor erred in not making the injunction permanent as to all the notes, and in not directing the receiver to take charge of them.

J. C. NICHOLS; P. B. BEDFORD, represented by NEWMAN & HARRISON, for plaintiff in error.

L. H. GREENLEAF; J. L. HARRIS, represented by S. B. SPENCER, for defendant.

MONTGOMERY, Judge.

1. This Court can only control the discretion of the Judge of the Superior Court where it has been manifestly abused. The law places the granting or refusal of an injunction in his, not our discretion. Though we may differ from him as to the soundness of its exercise in any given case, we may not interfere unless the facts show *manifest abuse* of it. Under the facts of this case it is not made manifest that there has been any abuse. The bill claims that *profits* have been made, not losses incurred, for which complainant might be held liable, and asks for a Receiver to take charge of such profits. A Receiver has been appointed and ordered to take charge of all that complainant is entitled to by the showing made in his bill, except some \$83 50 and use of one team, for which, if a partnership existed, he may have a right to an account on the final hearing, but hardly to an injunction and Receiver in face of the uncontradicted denial of insolvency on Weaver's part, in whose hands all the assets of the firm, if firm there was, appear to be. That Weaver returns no property in Pierce county is no evidence that he has no property elsewhere. How can this complainant be hurt by permitting the other partners to control their own share of the profits? The answers of Weaver and Knowles deny the partnership and alleged insolvency of defendant Weaver.

2. The affidavit of Charlotte Knowles in relation to facts not coming to her knowledge through confidential communications of her husband, one of the defendants, was properly received: *Jackson vs. Jackson*, 40 Ga., 150; *McIntire vs. Meldrine*, *Ibid*, 490.

Judgment affirmed.

Adams vs. Adams et al.

MARTHA ADAMS, plaintiff in error, *vs.* HOLLAND A. ADAMS
et al., defendants in error.

When dower had been assigned to a widow in a tract of land, and she afterward applied and had the same land set apart to her and the minor child of her deceased husband as a homestead, and an execution founded on a debt of the deceased husband and father was levied on the reversion, after the termination of the dower, and the widow, for herself and minor child, filed a claim :

Held, That under the facts, as stated, the property was properly found not subject.

Claim. Homestead. Dower. Before Judge HARRELL.
Stewart Superior Court. April Term, 1872.

This case was tried upon the following agreed state of facts: "That Samuel Adams, at the time of his death, about 1865, was the owner of the land now levied on; that Holland A. Adams was his widow, and administratrix, and Charles B. Adams, his administrator. The judgment of plaintiff was obtained in Stewart Superior Court, October Term, 1866; a *fi fa.* was issued thereon, and a levy made upon the lands claimed, in February, 1872, to wit: "the remainder interest of the estate of Samuel Adams, after the death of said widow." That in 1866 said Holland A. Adam's widow had said land set apart to her as dower, and on her application, as the widow of Samuel Adams, and one minor child of Samuel Adams, the same land as included in said dower, was set apart as a homestead by the Ordinary of Stewart county, to-wit: on July 6th, 1869. That the claim under said homestead was regularly interposed."

The Court, under the above statement of facts, decided that the claimant, Hollin A. Adams, in behalf of herself and said minor child, was entitled to a homestead on the land, and under instructions to this effect the jury found said property not subject.

Whereupon plaintiff in error excepted and assigns error upon the following grounds:

1st. In holding that claimant was entitled to have a homestead

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stead in the lands which had been set apart to her as dower.

2d. In holding that the property was not subject to the execution under the above statement of facts.

E. G. RAIFORD ; HERBERT FIELDER ; E. H. WORRILL,
for plaintiff in error.

BEALL & TUCKER, for defendants.

McCAY, Judge.

We have held, in several cases, that the homestead provision of the Constitution was not intended to be an addition to dower, but that it was subject to the dower. The object was to secure a provision for the family. The wife in this case had taken dower. She has now applied in behalf of her children and had a homestead in the same lands. We see nothing inconsistent in this action with our decision. She might, if she pleased, waive her rights in behalf of her children, and, instead of dower, permit them to have a homestead. We do not say she has done this. Holding to her dower she might, as guardian of her children, take a homestead for them in the same land, or including the same, at the discretion of the appraisers, and she and they retain their interest—she her dower, they their homestead. In either event the land would not be subject, and the verdict would be right.

Judgment affirmed.

JOHN C. CURRY, plaintiff in error, vs. ALEXANDER B.
HENDRY, defendant in error.

Upon the trial of a case, before a Justice of the Peace, for forcible entry, some force on the part of the defendant in entering must be shown. Where the entry is proved to be peaceable, the verdict should be for the defendant.

Curry vs. Hendry.

Forcible entry. Force. Evidence. Before Judge HARBELL. Randolph Superior Court. May Term, 1872.

Alexander B. Hendry sued out against John C. Curry the process of "forcible entry," for lot of land number six, in the sixth district of the county of Randolph.

Plaintiff testified that he had been in possession of said lot of land for three or four years, and a short time before he instituted legal proceedings, he found defendant in possession of one of the houses on said land; that he asked defendant how he came to take possession of said land; defendant replied, that Isaac Easley put him in possession; that plaintiff then asked defendant to deliver up possession to him; defendant replied that he had no wagon with which to move; that plaintiff offered to loan defendant his wagon; that defendant then declined to leave said land; that no unkind, unfriendly or angry words were spoken by defendant to plaintiff; that no menaces, force, arms nor violence were used to plaintiff; that witness did not remember telling Isaac Easley, in the town of Cuthbert, in October, 1871, "that there were some good old negroes on said lot of land;" that he did not promise said Easley to tell said negroes "to stay on said land to keep intruders off until he could make some arrangements about said land."

Defendant proposed to ask plaintiff the following question, to-wit: "If plaintiff did not come to said town of Cuthbert, on the first Tuesday in October, 1871, and tell Easley that he knew said lot of land belonged to him, and propose to buy the same of said Easley?" Which question the presiding magistrate refused to allow to be asked.

Defendant proposed to ask plaintiff the following question, to-wit: "If he did not, in the town of Cuthbert, in the month of November, 1871, say to said Easley, that Casper W. Jones had proposed to sell said lot of land to him, (Hendry) that he knew Jones had no title to said land, and thereupon refused to purchase, knowing that said land belonged to Easley, and then and there propose to purchase from him."

Which question the presiding magistrate refused to allow to be asked.

Defendant then proposed to ask plaintiff the following question, to-wit: "If he did not, at his gin house, on the first Tuesday in October, 1871, tell Jacob Jeffries that said lot of land belonged to Isaac Easley, and that he was coming to Cuthbert on that day to purchase said lot of land from him?" Which question the presiding magistrate refused to allow to be asked.

Defendant introduced Isaac Easley, who testified, substantially, as follows: Witness put defendant in possession of the lot of land some time in December, 1871; on the first Tuesday in October, 1871, plaintiff came to witness, in the town of Cuthbert, and proposed to purchase said lot of land from him; again, on the first Tuesday in November, 1871, at the same place, plaintiff proposed to purchase said land from him, at which time and place witness asked said plaintiff if any one was on the land; plaintiff replied that there were some old negroes; witness asked him what kind of negroes they were; plaintiff replied that they were good negroes; witness asked him if he would tell said negroes to stay on said lot of land and keep intruders off until he, witness, could make some arrangements about said lot of land; plaintiff promised to do this; plaintiff never said anything about his ever having been in possession of said lot of land, nor did he set up any claim to said possession; had he done so, witness would not have put defendant in possession of the same as his tenant.

Defendant then proposed to ask said witness the following question, to-wit: "If the said plaintiff, on the first Tuesday in October, 1871, in the town of Cuthbert, did not come to him and propose to purchase said lot of land, and tell him, further, that Caspar W. Jones had proposed to sell him (plaintiff) the land, that he knew said Jones had no title, and he would not purchase the same from him, but was then satisfied that Easley was the owner of said lot of land and he

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(plaintiff) wished to buy it?" Which question the Court refused to allow to be asked.

Defendant then introduced Jacob Jeffries, and proposed to ask him the same question that was excluded in the examination of plaintiff, as to the statements of plaintiff to him, the said Jeffries. The question was excluded by the presiding magistrate.

Defendant testified as follows: That Isaac Easley put him in possession of said lot of land; that he took it peaceably, using no force nor violence to get possession of the same; that after he moved into one of the houses on the land, plaintiff asked him how he came to be on the land; defendant stated that Easley put him in possession; plaintiff then asked him to deliver up possession of the premises, which defendant declined to do; there were no unkind words, no force, no violence, no anger manifested by either party to the other.

The presiding magistrate charged the jury as follows, to-wit: "They could consider but two questions, the possession and force; that Hendry had sworn that he had been in possession of said lot of land three or four years. Now if they believed what said Hendry had sworn, they should find for said Hendry."

The jury returned a verdict for the plaintiff.

The defendant carried the cause by writ of *certiorari* to the Superior Court, on the ground that the magistrate erred in refusing to allow the questions above set forth to be propounded, and in his charge as given to the jury.

Upon the hearing in the Superior Court, the writ of *certiorari* was dismissed and the judgment of the Court below affirmed, to which ruling plaintiff in error excepted.

B. S. WORRILL, for plaintiff in error.

H. FIELDER, for defendant.

MONTGOMERY, Judge.

The plaintiff below in this case having failed to show any force on the part of Curry in taking possession of the land, and the defendant having shown that he acquired possession peaceably, the verdict should have been for the defendant, and the *certiorari* should have been sustained. Force, in taking possession of the land on the part of the defendant, is the very gist of the proceeding—without it, he cannot be evicted by this process.

Judgment reversed.

WILLIAM J. BOSWORTH, plaintiff in error, vs. R. T. WALTERS and SAMUEL HEYS, defendant in error.

1. Where the securities of a sheriff applied to the Governor to be released from his bond, and the Governor ordered the sheriff to give another bond with security to the Ordinary of the county, within ten days; on failure to comply within the time prescribed, he forfeited his right to exercise the duties of the office, although there may have been a vacancy in the office of Ordinary during the period. (R.)
2. When the vacancy occurred in the office of the Ordinary, by his resignation, the Clerk of the Superior Court was authorized to perform all the duties which the Ordinary could have performed as Clerk. (R.)

Quo warranto. Vacancy. Election of officers. Clerk of Superior Court *ex officio* Ordinary. Before Judge CLARK. Sumter Superior Court. May Term, 1872.

For the facts of this case, see the decision.

JACK BROWN; G. W. WOOTEN; C. T. GOODE, W. A. HAWKINS, for plaintiff in error.

FORT & HOLLIS; J. ANSLEY, for defendant.

WARNER, Chief Justice.

This was a writ of *quo warranto* filed on the information of Bosworth, who claimed to be the sheriff of Sumter county, against Walters and Heys, who, it is alleged, were exercising the duties of sheriff of said county of Sumter, in violation of the legal right of Bosworth to hold and perform the duties of sheriff as aforesaid. It appears from the record, that Bosworth had been elected sheriff; that his securities had applied to the Governor to be released from his bond, and the Governor ordered him to give another bond, with security, within ten days to the Ordinary of said county. Bosworth failed to give the new bond within the time required, and a new election for sheriff was ordered, at which Walters was elected, and in the meantime Heys had been temporarily appointed sheriff by the Superior Court. The Ordinary had resigned his office, and there was no Ordinary, as Bosworth contends, who could take and approve his bond. On the trial before the jury as to the issuable facts submitted, they found a verdict in favor of Walters.

A motion was made for a new trial, which the Court overruled and the counsel for Bosworth excepted. The main question in the case is whether Bosworth's office as sheriff became vacant, inasmuch as there was no Ordinary to take and approve his bond as required by the Executive order within the ten days. When the vacancy occurred in the office of the Ordinary, by his resignation, the Clerk of the Superior Court was authorized to perform all the duties which the Ordinary could have performed as Clerk, and no more: Code, 358. The giving the bond and security within ten days, as required by the Executive order, was a condition precedent to enable him to exercise and perform the duties of sheriff, and if he had filed his bond executed in terms of the law, while the Clerk of the Superior Court, (who was authorized to perform the duties of Clerk of the Court of Ordinary,) or he tendered the same to him, subject to the approval of the Ordinary to be elected to fill the then existing vacancy in

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office, it would have been, in our judgment, a substantial compliance with the Executive order, but he never filed his bond as required by law, or tendered or offered to file the same with any officer subject to the approval of the Ordinary of the county when elected, and failing to do so, he forfeited his right to exercise the duties of the office of sheriff, and the new election was properly ordered.

Let the judgment of the Court below be affirmed.

THORNTON CARTER, plaintiff in error, vs. THE STATE, defendant in error.

1. Circumstantial evidence to warrant a conviction of one accused of a crime, must be so strong as to exclude every other reasonable hypothesis than that of the prisoner's guilt of the offense with which he is charged.
2. Newly discovered evidence tending to prove a fact material to the issue, and about which the defendant had offered no testimony on the trial, and he is chargeable with no want of diligence, entitles him to a new trial.

Criminal law. Circumstantial evidence. Newly discovered evidence. Before Judge COLE. Bibb Superior Court. October Adjourned Term, 1872.

Thornton Carter was placed on trial for the offense of burglary in the night time, in breaking and entering the store room of James H. Blount, with the intent to commit a larceny. The defendant pleaded not guilty. The following evidence was introduced :

FOR THE STATE.

Maria Lucas, sworn : Witness identifies prisoner ; went to see him on Thursday, at his house, and saw some rice and peas on the table ; defendant appeared to object to witness' entering the house ; also, saw a jar of preserves, which the inmates of the house moved, together with other things, as witness entered ; some of the peas were not shelled ; they

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were speckled peas ; saw some flour bread on the table ; the house had two rooms ; saw some bags in the back room, which defendant's wife was ripping up ; the bags appeared to be dirty with grease ; the women went into the other room and whispered together when witness entered the house ; defendant said there was not much fire in the room, but witness found, on entering, that there was a good fire ; defendant stated that he had seen witness' brother, who had informed him that witness had left Mr. Blount's, or he would have been up to see witness ; the store is in the basement of the house ; the windows open like a door, with four horizontal pieces of plank fastened on each side, and four augur holes in each ; witness went into the room on the next morning at about half past five o'clock, before the break of day ; found meat, meal, rice and peas ; witness lives at the house ; there were speckled peas in the store room in the shell ; the peas were missing ; a jar of lard was gone, and also a jar of preserves ; saw a jar at defendant's house closely resembling the jar lost from the store room ; it had the same name on it ; witness recognized it from the rag that was on it ; there were sacks in the store room, and some off of the meat box were missing ; the sacks resembled those at defendant's ; defendant had been a driver at Mr. Blount's ; the corn was kept in the store room ; defendant frequented the room to get corn for the horses, but was not living there at the time ; witness saw defendant that day at the dirt bridge, about fifty yards from the house ; the property stolen belonged to Mr. Blount ; the room was broken open on Wednesday ; the cloth on the preserve jar was white, tied with a black string and dirty with dust ; the bags were fine corn sacks, such as corn is ordinarily shipped in ; the two rooms in defendant's house adjoined ; witness was at defendant's house about one half hour, a little before four o'clock ; defendant was living at Collinsville ; defendant said that he thought witness left Mr. Blount's when Sam Perry left ; Sam had left some two weeks previous ; defendant had been to see witness after Sam left.

William Taylor, sworn : Witness recollects defendant

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ing placed in the guard house; witness asked him about some meat, rice and peas which were in his house on Thursday; may have asked him about flour; defendant said that he did not have them, only some flour that he had bought some time before the breaking open of Mr. Blount's room; this occurred on the morning after defendant was placed in the guard house; Mr. Blount resided in Bibb county; Collinsville is in Bibb county.

Mr. Blount, sworn: Witness' store room was broken open on Wednesday night before the last; witness had Carter arrested the next night; witness visited the guard house the next day with Lieutenant Taylor; Taylor had a conversation with defendant; defendant had been in the employment of witness, but had left during the Christmas holidays; witness had peas in the hall in his house; the articles mentioned in the indictment were gone; the breaking was done, witness thinks, by some one acquainted with the premises; the property stolen belonged to witness.

FOR THE DEFENDANT.

Anna Dawson, sworn: Witness lives in Collinsville, on her own lot, with her mother; Mary Lucas came to witness' house on Thursday a week ago; she was talking to witness' brother; witness did not hear the conversation; went, on Wednesday, with her brother, the defendant, to the Blind Asylum, at about half past five o'clock, P. M.; thence, down town to carry clothes; thence to church, and reached home by ten o'clock; Mrs. Sarah Lowe and Mrs. Harris were present when the defendant and witness arrived at home; defendant went at once to bed; there are four rooms in witness' house; defendant sleeps in the back room, and has to pass through witness' room to get out of the front door; saw defendant the next morning, when witness got up; witness got up first; there was an outside door in defendant's room that led into the back yard; there was nothing on the table but witness' ironing things, some glasses, covered with a towel and some shirts; there was nothing eatable on the table; on

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Wednesday night there was no one present except the family; defendant had been sick, but was well enough to go to church with witness; it was the first time that he had been out for three weeks; defendant had a room which he occupied with his wife; the house is weather-boarded; defendant did not leave home on Wednesday night; cannot state if any one was there while witness was away; defendant was over to Mr. Riley's on Wednesday evening.

Alice Smith, sworn: Defendant lives in one of the back rooms of the same house with witness; was at home on Wednesday night; no one but the family were there; defendant was at church and came home about ten o'clock; does not know that defendant went to church that night beyond what he stated.

STATEMENT OF DEFENDANT.

"I was sick in bed part of the week, waited on by the Ring Dove Society; Tuesday night my brother came to see me and made a fire for me; on Wednesday I felt better and walked about; Wednesday evening, about 5½ o'clock, I went with my sister to my mother's at the Blind Asylum. Sister went down to Mr. Winship's store to carry Mr. O'Neal's shirts; when she came back to mother's I had a fire made in mother's room; that was about 8 o'clock; after supper we went to church; it was very cold and, being unwell, I proposed to go home; when near Polhill's school-house I met Jane Richards and Fanny Jewett, and they said to me, "where are you going?" I replied "home," and they induced me to go to church with them. After church my sister, Georgia Tompkins and myself started home together; I met Alick Day in front of Mr. Wheeler's gate and we proceeded home together."

The jury returned a verdict of guilty, and defendant moved for a new trial upon the following grounds, to-wit:

1st. Because since the said trial defendant has discovered that Maria Lucas, the principal material witness for the State, made to various parties different statements as to the

offense charged in the indictment, at one time alleging that she absolutely knew nothing of the facts of the case or the cause of defendant's arrest, and at another time alleging that she knew defendant committed the offense for the reason that she had tracked defendant to the house where the offense had been committed.

2d. Because since said trial defendant has discovered that said Maria Lucas, witness as aforesaid, is a woman of desperately bad character, and that her reputation for want of veracity and truthfulness is so great and apparent that she is not worthy of credence in any Court of justice.

3d. Because since said trial defendant has discovered that certain articles which said Maria Lucas has testified as having seen in the house in which defendant was at the time said witness came there, were sent by Harriet Thomas, the owner of the house, from the Blind Asylum in the city of Macon, and could have been identified by said Harriet Thomas.

4th. Because at the time of the trial defendant, being wholly illiterate and knowing nothing of the law or the rules of evidence, he had not brought to the knowledge of counsel the fact that the room in which Maria Lucas had testified to seeing the articles which she recognized as the property of J. H. Blount, was not the place of abode of defendant, but the abode of Anna Dawson and family; that defendant lived in another part of the house, which contained four rooms occupied by different persons.

5th. Because said verdict is contrary to the evidence and the law.

In support of the grounds based upon newly-discovered evidence, affidavits of the witnesses, defendant and of his counsel, all in proper form, sustaining the grounds as set forth, were annexed.

The motion was overruled by the Court, and plaintiff in error excepted and assigns said ruling as error.

Carter vs. The State.

M. B. GUEBRY, represented by JAMES JACKSON, for plaintiff in error.

E. W. CROCKER, Solicitor General; SAMUEL HALL; R. W. JEMISON, represented by G. W. GUSTIN, for the State.

MONTGOMERY, Judge.

1. The verdict of guilty in this case is based entirely upon circumstantial evidence, which we hardly think excludes every other reasonable hypothesis but that of the prisoner's guilt. No article seen by the only witness who undertakes to identify them is sufficiently proven to bear more than a resemblance to the missing articles of the prosecutor. Nor were the articles shown to be in the possession of the defendant, but only in a house of which he was an inmate, his own domicile being a room different from that in which the articles supposed to be those stolen, were found. But suppose the articles identified and proven in the possession of the defendant, does that show burglary in the night time? Or does the whole evidence exclude every other reasonable hypothesis than the guilt of burglary in the night time? Is it not equally reasonable to suppose that the defendant has been guilty of receiving stolen goods, knowing them to be stolen?

2. We think also the testimony of Harriet Thomas, if it had been before the jury, might have altered their verdict. It is material, and we cannot say there was any *laches* on the part of the defendant in not having it before the Court on the trial.

Upon the whole, we think a new trial should be granted. Judgment reversed.

AUGUSTUS J. MERCIER, plaintiff in error, vs. GEORGIA A. MERCIER, defendant in error.

The verdict in this case is fully sustained by the evidence, and this Court will, in its judgment, award damages against the plaintiff in error, on the ground that the case was brought up for delay only.

Evidence. Damages. New trial. Before Judge HARBELL. Early Superior Court. April Term, 1872.

Georgia A. Mercier brought complaint against Augustus J. Mercier for one sewing machine, of the value of \$150, and of the annual value of \$25.

It appeared; from the evidence, that the sewing machine, a "Wheeler & Wilson," was purchased by plaintiff's father, George Mercier, in New York, at the price of \$125; that her said father gave the sewing machine to plaintiff; that she had used said machine seven or eight years prior to leaving her father's house in 1868; that a few months after plaintiff left her father's house, he died, and the machine went into the possession of the defendant, who was the executor of her father's will; that before the institution of suit she demanded said machine from defendant, and he refused to deliver it up; that plaintiff was the only one of the family that could use the machine; that "Wheeler & Wilson's machines" are now worth, with attachments, from \$60 to \$175, the high priced ones being cased; that the casing makes them more costly; that the rent of such machines are worth per annum from \$10 to \$50; that the machine in controversy had no attachments; that plaintiff demanded possession of the machine in February, 1869.

At the April Term, 1872, of said Court, the jury returned a verdict for the plaintiff for \$200, "being the value and rent of the sewing machine."

Defendant moved for a new trial upon the ground that the verdict was contrary to evidence and to law. The motion

Mercier vs. Mercier.

was overruled by the Court, and plaintiff in error excepted, and assigns said ruling as error.

J. E. BOWER; R. SIMS, by brief, for plaintiff in error.

THOMAS F. JONES; H. FIELDER, for defendant.

McCAY, Judge.

We do not see any ground for reversing the judgment of the Court in this case. The only pretence of error is, that he ought to have set aside the verdict as contrary to evidence, and we think he was right in not doing this. If the verdict of a jury is not to stand because the proof on which it is founded is not clearly in its favor, our whole theory of jury trials will be subverted. We have so often and so decidedly declared our opinions on this subject, that we do not care again to go over them. The jury is just as much a final arbiter, in its sphere, as the Court, and in matters of fact, it is generally far more apt to be right. The consent of twelve minds to a verdict is a pretty sure evidence of its correctness. And the error ought to be very plain for one mind to set it aside.

As we have said, we see no good reason for this bill of exceptions. We think this lady has been improperly delayed in this matter, and we award her the damages authorized by law in such cases, and judgment will be so entered.

Judgment affirmed.

Jackson *vs.* Gayden.

BLAKE JACKSON, plaintiff in error, *vs.* F. T. GAYDEN, defendant in error.

In suit on a bond executed before June, 1865, and for the payment of money, upon the happening of a certain contingency, which does not appen until after that date, no affidavit of the payment of taxes need e filed.

The judgment of the Court below dismissing a suit upon an erroneous round will not be sustained, because there is a defect in the declaration upon which the suit might have been dismissed, but which could e cured by amendment.

Relief law of 1870. Tax affidavit. Practice. Before Judge HOPKINS. Clayton Superior Court. September Term, 71.

Blake Jackson, as transferree, sued out an attachment inst F. T. Gayden, and filed his declaration, upon the lowing bond :

GEORGIA—CLAYTON COUNTY :

‘ Know all men by these presents, that I, F. T. Gayden, the county of Clayton, am held and firmly bound unto B. Jackson in the sum of \$400, for the true payment of ich unto the said L. B. Jackson and his heirs, I bind self, my heirs, executors and administrators firmly by se presents. Signed, sealed and dated this 18th day of uary, 1860.

“ The condition of the above bond is such that, whereas re is now pending in the Superior Court of the county of yette, State aforesaid, a certain action of ejectment in favor John Trushlet against John S. Jackson for the recovery a certain lot of land in the thirteenth district of Fayette unty, known as lot number two hundred and twenty-five. ow, if the said John Trushlet shall fail to recover the said of land, or its equivalent in money, from the said John Jackson, then this bond to be null and void, and in the ent the said John Trushlet recovers said lot, or its equiva-

Jackson vs. Gayden.

lent in money, from the said John S. Jackson, then this bond to remain of full force and effect.

"Signed, sealed and dated the day and year above written.

(Signed)

F. T. GAYDEN."

When said cause was called for trial defendant moved to dismiss the same because the plaintiff had failed to file his affidavit that all legal taxes had been paid in terms of the Act of October 13th, 1870. Plaintiff proposed to show that said cause did not fall within the aforesaid Act, in this, that said bond was given to indemnify one L. B. Jackson against the loss of a certain lot of land, which lot was involved in litigation in Fayette Superior Court, in favor of John Trushlet against John S. Jackson; that said land was recovered by said Trushlet at the October Term, 1870, of Fayette Superior Court, and that no right of action had accrued to the transferee of said bond until the termination of said suit; that no taxes were due upon said obligation until after the eviction, and that said eviction was not had until after said October Term, 1870, and, therefore, no affidavit was required.

The motion was sustained and the case dismissed. Whereupon plaintiff excepted, and now assigns said ruling as error.

To the bill of exceptions the Judge attached the following note:

"There was no affidavit in reference to the payment of taxes filed in this case. I stated at the time the order of dismissal was made that there were other grounds on which the dismissal might be placed. I did not so announce, but I was of the opinion that no sufficient cause of action was set forth in the declaration."

J. L. BLALOCK; B. F. ABBOT; R. S. DORSEY, for plaintiff in error.

JOHN L. DOYAL; S. S. FEARS, for defendant.

MONTGOMERY, Judge.

1. The cases of *Sirrine, administrator, vs. The Southwestern Railroad Company*, 43 Georgia, 280, and of *Pace vs. Williams*, 44 Georgia, must control the present case upon the question of the tax affidavit required by the Act of 1870. Under those decisions no affidavit is necessary.

2. The fact that there is an amendable defect in the declaration, which, if not amended, would have authorized a dismissal of the case, will not justify this Court in sustaining the Court below in dismissing the case for want of the tax affidavit. Had a motion been made to dismiss the case on account of the defect, the declaration could, and probably would, have been amended to meet the objection.

Judgment reversed.

JIM WILLIAMS, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

Where, upon the trial of the defendant for the offense of an assault with intent to murder, the jury returned a verdict finding "the defendant guilty of an assault with intent to kill," and upon being remanded to the jury-room, with instructions from the Court, returned a general verdict of "guilty," a motion in arrest of judgment, based upon the facts aforesaid, was properly overruled. (R.)

Criminal law. Verdict. Practice. Before Judge HOPKINS. Fulton Superior Court. April Term, 1872. .

For the facts of this case, see the decision.

FABROW & THOMAS, for plaintiff in error. 1st. The first verdict, though a special and partial verdict, was nevertheless valid and binding. Judgment could have been rendered thereon: *Graham & Waterman*, on New Trials, vol. 3, page 1419; *Bishop's Criminal Procedure*, vol. 1, sec. 831, *et seq*; *Bishop's Criminal Law*, vol. 1, sec. 809. 2d. Special ver-

Williams vs. The State of Georgia.

dicts not amendable; except as to matter of form: Bishop's Criminal Procedure, vol. 1, sec. 839; 26 Ga. R., 593.

J. T. GLENN, Solicitor General, for the State. 1st. The jury should have returned a general verdict of guilty, or not guilty, or guilty of some less offense: Code, sec. 4552. The Court was right in having the verdict made complete before receiving it: 26 Ga. R., 593; 14 *Ibid*, 8; 28 *Ibid*, 367.

WARNER, Chief Justice.

The defendant was indicted for the offense of an assault with intent to murder. On the trial of the case, the jury came into Court with the following verdict: "We, the jury, find the defendant guilty of an assault, with intent to kill." Objection being made to the form of the verdict by the Solicitor General, the Court, after making inquiry of the jury as to what was their intention to find by their verdict, and the response not being satisfactory, the jury were remanded to the jury-room by the Court, with instructions that the form of their verdict should be either a general verdict of guilty, or a general verdict of not guilty, or a partial verdict of guilty of an assault and battery. The jury, after having retired, returned into Court with a general verdict of guilty. The defendant made a motion in arrest of judgment, on the ground that the verdict was illegal, and contrary to law under the facts in the case, which motion was overruled by the Court, and the defendant excepted. We find no error in the refusal of the Court to grant the motion in arrest of judgment, on the statement of facts disclosed in the record. The first verdict was an informal and imperfect verdict, and it was the duty of the Court to remand the jury to their room, with the instructions given to them in regard to their legal duty, as to the form of their verdict.

Let the judgment of the Court below be affirmed.

AMES W. HERTY, plaintiff in error, vs. JOHN M. CLARK,
defendant in error.

- . A settlement between two partners, whereby one buys the other's interest in the partnership property, and gives his note for the amount found to be due the retiring partner, does not estop the maker of the note from pleading and showing, when sued on the note, that it was given for too much, by mistake, arising out of an erroneous charge against the maker of the note in the settlement. The fact that the maker received the note after discovery of the mistake by him, and while it was a matter of dispute, still insisting that it existed, does not vary the rule.
- . There being evidence in this case of the existence of the mistake, and the jury having so found, we will not disturb the verdict.

Partnership. Settlement. Mistake. Before Judge ROBINSON. Baldwin Superior Court. February Term, 1872.

James W. Herty brought complaint against John M. Clark on a promissory note, dated April 1st, 1870, due one day after the date thereof, payable to James W. Herty, or order, for the sum of \$800, with the following credits thereon, to-wit: May 15th, 1870, \$200; July 1st, 1870, \$100; July 9th, 1870, \$210.

The defendant pleaded that said note was given by mistake for \$240, principal, and \$20, interest, too much, upon a settlement had between plaintiff and defendant.

Clark testified, that he and Herty were in partnership in the drug business; that the firm was dissolved on November 27th, 1867, defendant giving plaintiff \$4,000, and plaintiff's account to the firm of \$689, for his interest; that defendant gave his note for \$4,000, and by October of the next year, had reduced the debt to \$2,204 63, for which he gave two notes: one for \$1,822 50, and the other for \$382 13; that the following April, 1869, plaintiff, in addition to the notes given in October, 1868, which were in full of all debts then due, presented an account containing an item of \$540, for money which plaintiff had borrowed from his sister and put into the firm, and for which he held the firm responsible

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on the day of settlement, November 27th, 1867, it forming a part of his account with Clarke & Herty; that on April 1st, 1869, on a settlement had between plaintiff and defendant, a balance was found due of \$1,207 88, for which defendant gave his note, but that said balance contained an honest mistake of plaintiff of \$240, principal, and \$20, interest, in this: that one item upon which said balance was founded, charging defendant with Miss M. E. Herty's bill of cash, \$540, and interest of \$20, less a counter-charge of \$300, embraced in said Miss Herty's bill, due to said defendant, of \$685 05, had been, long before said balance was found, to-wit: on November 27th, 1867, fully settled, and had been allowed to plaintiff in part payment of his own debt to defendant as copartner in the drug business; that, by continual payments, the debt was reduced, on July 30th, 1870, to \$290, and defendant offered to pay the balance of \$50; that defendant had given notes with a knowledge of the mistake, but had always claimed the mistake as existing; that the mistake originated when the account was presented in April, 1869, it having fully entered into the settlement of November 27th, 1867; that defendant did promise to plaintiff to close the account on the shop books, but he did not do so because he became convinced that the account was wrong; that the books were kept by plaintiff, and whatever mistake there is, is an error of his.

Herty testified, that in the matter of the \$540 of Miss Herty's account, the amount was to be credited on her account, and in the sale of the half interest, it was not to be included in the account of plaintiff; that when the notes for \$1,822 50, and \$382 13, were given by the defendant, the matter was considered settled upon that basis, was mentioned at the time; that defendant promised to balance his books to that date; that the credit of \$540 was to be carried to Miss Herty's account; that when said two notes were taken, leaving balance due to plaintiff of \$1,207 88, the amount \$540 was still considered due to Miss Herty, less the amount charged on her account; that in the final settlement,

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e note for \$800 and due bill for \$75 were given, the \$540 is still considered as being to the credit of Miss Herty, less her account; that, at the final interview, defendant acknowledged the amount just, and promised to pay it; that in assuming the account of Miss Herty in the statement of April 1st, 1869, it was considered that the credit of \$540 was allowed; that plaintiff would not have assumed her account of \$85 05 if the credit of \$540, and interest of \$20, had not been allowed.

The statement of April 1st, 1869, was as follows :

J. W. Herty in account with J. M. Clark,	Dr.
69..April 1st..To amount of Mrs. F. A. Herty's	
bill to April 1st.....	\$1,058 96
69..April 1st..To amount of Miss M. E. Herty's	
bill to April 1st.....	685 05
69..April 1st..To amount of B. R. Herty's bill	
bill to April 1st.....	500 90
69..April 1st..To amount of J. W. Herty's bill	
\$2,881 67.....	636 76
...By notes of J. M. C. ^{1,812 50} _{383 13}	\$2,205 63
By cash, Miss M. E. Herty.....	540 00
By interest, Miss M. E. Herty.....	20 00
By B. R. Herty's bill.....	1,250 00
By account of A. Joseph.....	7 00
By account of N. G. Lanterman.....	65 85
By overcharge in bill \$4,089 55.....	70
Amount due J. W. H., April 1st.....	\$1,207 88

The jury returned a verdict for the plaintiff for \$30, with arrest. The plaintiff moved for a new trial because the verdict was contrary to the evidence and to law. The motion was overruled and plaintiff excepted.

CRAWFORD & WILLIAMSON, for plaintiff in error.

WILLIAM MCKINLEY, for defendant.

Underwriters' Agency vs. Sutherlin.

MONTGOMERY, Judge.

1. Mistake in settlement of accounts is too common a ground for the interposition of a Court of equity, and *pro hac vice*, on a proper case made, our Courts of law are Courts of equity—to need elaboration—1 Story's Equity Jurisprudence, section 452, and the sections immediately preceding. The fact that Clark gave his note, not in settlement or by way of compromise of the disputed amount, (for he insisted at the time that the mistake existed,) but subject to future adjustment, does not estop him.

2. This settled, the only remaining point to consider is, did the jury have sufficient evidence before them of the mistake to justify their verdict. As to amounts the record is confused—the plea admits \$30 due the plaintiff, and is, of course, sworn to—and the jury find for this amount. Clark, in his testimony, says “fifty dollars” is still due, but this is written in figures in the record and may be intended for thirty. The note of \$800, according to Clark's testimony, was for \$240 principal, and \$20 interest, too much. Allowing, first, this credit and then the credits indorsed on it, and the verdict of the jury is right, omitting some slight interest which they probably thought counterbalanced by the interest Clark had been paying on the \$260 before the discovery of the mistake. True, Herty contradicts all this testimony about a mistake. Still Clark's evidence supports the verdict and the judgment must, therefore, be affirmed.

Judgment affirmed.

UNDERWRITERS' AGENCY, plaintiff in error, vs. WILLIAM T. SUTHERLIN, defendant in error.

Where an insurance was effected under an open policy of insurance issued to the company's agent, the insured taking a certificate of insurance was according to the terms specified in said open policy which was retained by the agent :

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Held, That in a suit for a loss, it was not sufficient for the plaintiff to produce the certificate alone, since on its face it appeared that it did not contain the whole agreement.

Attachment. Insurance. Open policy. Before RICHARD F. LYON, Esq., Attorney at Law, presiding by consent. Dougherty Superior Court. June Term, 1871.

William T. Sutherlin sued out an attachment against the Underwriters' Agency, composed of the Germania, Hanover, Niagara and Republic Fire Insurance Companies, of New York, for the sum of \$742 43, besides interest and expenses. At the appearance term a declaration in attachment was filed, containing, substantially, the following allegations; that petitioner brings his suit upon the following written contract, to-wit:

"No. 29. *Underwriters' Agency.* \$4,000.

"Germania, Hanover, Niagara and Republic Fire Insurance Companies, of the city of New York.

"ALBANY, GA., January 20th, 1866.

"This is to certify that William T. Sutherlin is insured for account of whom it may concern, under and subject to the conditions of policy number seven hundred and eighty, issued by the above named companies, in the sum of \$4,000, each company bearing one-fourth of the risk taken upon (20) twenty bales of cotton, marked W. T. S., on board cargo of the box number eighteen—Saucer, master—at and from Albany, Georgia, to Apalachicola, at the rate of four per cent., which premium of \$160 is hereby acknowledged to have been received. Loss, if any, payable to W. T. Sutherlin, or order hereon at New York, upon the return of this certificate.

(Signed,)

"Y. G. RUST, Agent."

Countersigned, A. S. STODDARD,

General Agent, New York."

Indorsed on the face as follows:

"The property is insured under this policy from Apalachicola to New York, by good steamers or sailing vessels, and includes twenty days fire risk at Apalachicola from the dis-

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charge of the box." That on January 20th, 1866, petitioner shipped from Albany, Georgia, for the city of New York, *via* Apalachicola, twenty bales of cotton, marked W. T. S., on board of cotton box, number eighteen, whereof one Sauer was master; that at Apalachicola said cotton was, in good order, shipped on the bark J. H. McLaren for the city of New York, the point of final destination; that at the date of shipment said cotton was of the value of \$4,000; that said bark arrived safely at the city of New York, on or about April 10th, 1866; that a survey was made by the port wardens of the city of New York, said cotton pronounced damaged by water, and a sale ordered and made by due course of trade, and under existing laws then in force, netting from said sale the sum of \$2,527 16, such sale occurring on April 20th, 1866; that defendant is therefore indebted to petitioner the principal sum of \$1,475 85, with interest thereon from said date of sale until paid; that petitioner has demanded, and defendant has refused payment of said claim."

The record fails to disclose the plea filed by defendant.

When the case was called for trial, it was agreed between the parties that Richard F. Lyon, Esq., an attorney at law, should preside, Judge Strozier having been of counsel for plaintiff.

Plaintiff introduced the certificate in his declaration set forth; also his own deposition, and that of W. H. Price, who examined the cotton upon its arrival in New York, by which the damage was proven and also efforts to obtain a settlement from defendant. Plaintiff closed.

Much evidence was introduced by the defendant, which it is unnecessary here to set forth, as a consideration of the same is not involved in the decision of the Court.

The jury returned a verdict for the plaintiff for the sum of \$728 75, with interest from date of the sale of cotton.

The defendant moved for a new trial upon the following among other grounds, to-wit:

Because said verdict is without any evidence to support it and manifestly against the weight of evidence.

Underwriters' Agency *vs.* Sutherland.

The motion for a new trial was overruled, and plaintiff in error excepted.

VASON & DAVIS; CLARK & GOSS, for plaintiff in error.

W. E. SMITH, for defendant.

MCCAY, Judge.

Did this case turn solely on the proof of loss, we are not prepared to say that the verdict is wrong. Section 2788 of our Code gives a very wide definition of the phrase, "perils of the sea," and the phraseology of the latter clause would seem to make the insurer responsible, even for the negligence of the master, except in the cases there specified. True, this section seems in conflict with section 2785, but there may be reason in the suggestion that section 2785 refers to an insurance on the *ship* only. We do not, however, intend to decide this point, as, in the view we take of the case, there must be a new trial on other points. We think the Court erred in ruling out the policy, or, rather, we are of opinion that the policy was a necessary part of the plaintiff's case. The certificate is not, of itself, a complete contract by the company. It expressly provides that the terms and conditions of the contract are to be regulated by policy number On its very face, the paper produced shows that it does not contain the whole contract. How can any one say what the contract was from the certificate alone? What is the risk taken? It does not say. What are the terms and conditions? It does not say. It stipulates, expressly, that these terms and conditions are set forth in another paper. True, that other paper is in the custody of the defendant; but that was well known to the parties. It was the usual mode of business for the agent to retain this paper. But its contents were well known to Rust, who was the mutual agent of both parties, as the evidence shows. In any event, the paper certificate declares and notifies all concerned that it is not the whole contract. It was in the power of the plaintiff to com-

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pel the production of the policy, and as it was a necessary part of the plaintiff's case, he should have taken the legal steps required for that purpose. As it was produced by the defendant, without notice, the plaintiff's case, in this respect, was complete. But when, on his motion, it was ruled out, his case was fatally defective, since it appeared, affirmatively, to the Court that the full contract of the parties was not before the jury.

We are not sure that the Court was not technically right in ruling out the paper as evidence for the defendant. The whole policy was not produced. What we have was torn away from something else. Whether what was not produced was or was not material, does not clearly appear. Had the plaintiff given the notice, and the defendant failed to produce the whole, the remedy is apparent. But as no notice was given or shown, the plaintiff's case was incomplete, the contract was not before the Court, and no excuse is offered why it was not. For this reason, we think there ought to be a new trial. The verdict is not sustained by the evidence, because it was not shown what the real contract of the parties was.

Judgment reversed.

JOHN HARKINS, plaintiff in error, vs. CLEMENT ARNOLD,
next friend, defendant in error.

1. Where an applicant for homestead seeks to have realty, alone, to the value of \$2,000 in specie, set apart, it is unnecessary to file a schedule of personalty.
2. Where it appears that a widow, with minor children, whose father died in this State, married a second time, and she and her husband, after living in the county of her first husband's residence for some time, left the State, taking the minors with them, but frequently avowed, and still avow, their intention of returning to their former home, and they claim never to have abandoned, and application is made, in behalf of the minors, for homestead out of their father's estate, by next friend, in the county in which the father died resident, and objection is made

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by a creditor of the father, on the ground that the minors are not citizens of Georgia, and, therefore, not entitled to a homestead, and the jury, on appeal from the Ordinary who granted the homestead, affirm his judgment:

Held, That the question of domicile was one of fact, under the circumstances, the jury having found in favor of the minors' right to homestead, this Court will not disturb the verdict which is warranted by the evidence.

3. An infant who has no guardian, may apply, by next friend, for a homestead.

Homestead. Domicil. Before Judge PARROTT. Gordon Superior Court. February Term, 1872.

Clement Arnold, as next friend of Mary A. Darnell, formerly Mary A. Cobot, widow of F. M. Cobot, deceased, and of Mark Cobot, Norman F. Cobot, Frederick M. Cobot and John P. Cobot, minor children of said F. M. Cobot, petitioned the Ordinary of Gordon county to have a homestead set apart for the benefit of said widow and minors in the real estate of said F. M. Cobot.

John Harkins, a creditor, objected, upon the following grounds, to-wit:

1st. Because said applicant has not filed a schedule of the personal property owned by the estate of deceased.

2d. Because said widow and minor children are non-residents of the State of Georgia.

3d. Because said widow has had a large amount of said estate before the filing of said application, to-wit: more than is allowed for a homestead.

Issue having been joined upon the aforesaid objections, and the homestead allowed by the Ordinary, John Harkins appealed to the Superior Court.

Upon the trial before the jury, it appeared from the evidence that F. M. Cobot died in 1864, leaving the aforesaid widow and minor children; that Mrs. Cobot married W. H. Darnell in 1867 or 1868, and resided in Calhoun, Georgia; that Darnell, in 1868, went to Floyd county, temporarily, for the purpose of teaching school, claiming, always, Calhoun as his home; that Darnell left Calhoun in January,

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1869, and went to Lebanon, Tennessee, in response to a call from a Cumberland Presbyterian congregation; that he was a minister of the gospel of the Cumberland Presbyterian Church; that Darnell never relinquished Calhoun as his home, but said, on the contrary, that he intended to return at the end of the year for which he was engaged by said church; that he has not yet returned, and is engaged for another year; that the aforesaid minor children accompanied him to Lebanon, Tennessee; that Darnell has written many letters to persons in Calhoun expressing his intention of returning.

The jury returned a verdict in favor of the applicant. John Harkins moved for a new trial, upon the following grounds, to-wit:

1st. Because the verdict is strongly and decidedly against the weight of evidence.

2d. Because the verdict is contrary to law.

The motion for a new trial was overruled, and plaintiff in error excepted and assigns said ruling as error.

UNDERWOOD & ROWELL, represented by E. N. BROYLES, for plaintiff in error.

W. H. DABNEY, for defendant.

MONTGOMERY, Judge.

1. The Act of October 3d, 1868, provides that every person seeking the benefit of the Act "should make out a schedule and description of the personal property claimed by him to be exempt," etc.

The Act of March 20th, 1869, enacts that "it shall be the duty of such debtor, when he takes steps in the Court of Ordinary, or before the proper Court, to have said exemption of personalty set off to him to make a full and fair disclosure of all the personal property," etc. Only then when he obtains exemption of personalty is it his duty to file a schedule.

2. My associates prefer, in this case, to treat the question

of domicile which arises, as a question of fact, and (under the evidence as set forth in the decision pronounced from the bench and as embodied in the statement of facts by the Reporter,) to hold that the jury had sufficient evidence before them of the *animus revertendi* on the parts of the step-father and the mother of the children to sanction the verdict. For myself I am prepared to say, as matter of law, that the minors have never lost their domicile in Gordon county, so far as to deprive them of their right to homestead, for the following reasons: First, the place of birth of a person is considered as his domicile, if it is at the time of his birth the domicile of his parents, or, rather, of his father. *Patris originem unusquisque sequatur*. Secondly, the domicile of birth of minors continues until they have obtained a new domicile. Thirdly, minors are generally deemed incapable, *proprio motu*, of changing their domicile during minority. [This rule has, perhaps, its exceptions: *Roberts vs. Walker*, 18 Georgia, 5;] and, therefore, they retain the domicile of their father. Fourthly, if the father dies, his last domicile is that of his infant child.

A widow retains the domicile of her deceased husband until she obtains another. A married woman follows the domicile of her husband: Story's Conflict of Laws, section 46. At common law a domicile cannot be acquired by act of the infant; but, with the exception of fraud, a domicile acquired by the mother with whom the infant continues to reside (the father being dead) becomes the domicile of the infant: *Pottinger vs. Wrightman*, 3 Mer., 67. But by the civil law minors retain the domicile which their father had at the time of his decease, although the infants afterward remove with the consent of their curators, tutors or relations; because they are not permitted to change the order of their succession to personal property, which depends on the law of domicile: 2 Domat's Public Law, 487, book 1, title 16, section 3, article 10. This principle does not appear to have been adopted by the common law because the right of inheritance is not changed by a change of domicile within the State nor is the

Harkins vs. Arnold.

settlement of estates affected thereby: *Holyoke vs. Haskins*, 5 Pickering's Reports, 25-6, and authorities there cited.

In Georgia, if, as contended by counsel, no one, who is a resident of another State, is entitled to homestead here, the reason of the civil law applies in full force. In addition to this, section 1695 of the Code provides that "A person, whose domicile for any reason is dependent upon that of another, can, by no act or volition of his, effect a change of his own domicile; nor can a guardian change the domicile of his ward by a change of his own, or otherwise, so as to interfere with the rules of inheritance or succession, or otherwise affect the rights or interests of third persons." The same person may have a domicile in one place for one purpose—in another, for another purpose: *Somerville vs. Somerville*, 5 Vesey, 786. For these reasons, as matter of law, I think that no change of the domicile of the mother, the natural guardian of the children, could so far change their domicile as to deprive them of their right to homestead in their father's estate. The jury, however, have found, as matter of fact, that their step-father did not change his domicile. There is evidence to sustain this finding. And this settles their right to homestead.

3. Section 13 of the Homestead Act of 1868 provides that the minors may apply for homestead by next friend.

Judgment affirmed.

INDEX.

ABATEMENT. See *Domicil*, 2.

ACCESSORY. See *Criminal Law*, 22, 23.

ACCORD AND SATISFACTION.

See *Usury*, 4.

ACCOUNT. See *Judgment*, 5.

ADEPTION. See *Will*, 9.

ADMINISTRATORS AND EXECUTORS.

1. When an administrator sells railroad stock, the property of the estate which he represents, at private sale, and his vendee sells to a *bona fide* purchaser without notice, the title of such purchaser will be protected, as against the heirs of said estate. *Nutting et al. vs. Thomason et al.*..... 34
2. If the original purchasers of this stock bought it from the administrator at private sale, under such circumstances as the law will charge them with notice, and have either appropriated it to their own use or sold it to others, then they are liable to the heirs for a conversion of it, such purchase being a fraud upon their rights. *Ibid.*
3. A paper, signed by the Ordinary, purporting to grant to an administrator leave to sell the land of the estate which he represented, which had never been recorded or entered on the minutes of the Court, and without proof that such order had been granted, at a regular term of the Court of Ordinary, is inadmissible in evidence. *Groover et al. vs. King*..... 101
4. The recital in an administrator's deed, executed on the 3d day of December, 1861, that leave to sell the land was granted in November last past, is notice to the purchaser that the requirement of the law, as to

- forty days' public notice of the sale, had not been complied with. *Ibid.*
5. Although the minor heirs of the intestate may have had a guardian who receipted to the administrator for their portion of the proceeds of the land, without any knowledge of the illegality of the sale, yet they were not estopped from asserting their claim to the land, when they obtained a knowledge of such illegal sale, they accounting for the money received. *Ibid.*
 6. Where a suit is brought by administrators against an attorney for money collected by him as their attorney and not as an attorney for their intestate, the allegation in the pleadings of their representative character is mere surplusage, as they were entitled to maintain the action in their own names. *Kenan, executor, vs. DuBignon et al., administrators*..... 258
 7. Suit being brought by administrators, proof of their representative character is unnecessary, unless denied by plea. *Ibid.*
 8. Where a note is given by a temporary administrator for property purchased at an administrator's sale, it does not bind the estate which he represents. *Funderburk, administrator, vs. Gorham et al.*..... 296
 9. If the property purchased is appropriated for the benefit of the estate represented by the temporary administrator, and he is insolvent, the creditor may proceed against said estate. *Ibid.*
 10. Where a creditor applies for letters of administration upon the estate of his deceased debtor, it was error in the Court to exclude notes and mortgage to secure the same, made by the debtor, which were offered in evidence to show the indebtedness, on the ground that no affidavit had been filed of the payment of taxes thereon. *Einstein vs. Latimer et al.*..... 315
 11. An executor who, by the will of his testator, (probated in 1853, and by which a solvent estate of more than \$200,000 is committed to his hands,) is directed to move a slave to a free State, to be there manumitted, and to invest for such manumitted slave, on his arrival at age, which occurs in 1862, \$3,000, cannot, after refusing to execute the bequest of his testator, until the close of the war, free himself from liability.

- by showing that the estate has perished on his hands from the results of the war and other causes. *Ander-son vs. Green, executor* 361
12. If an executor buy land of his testator at his own sale, the purchase is voidable at the election of a legatee. *Ibid.*
13. Where an executor relies on the defense of *plene administravit*, it is not error in the Court to charge the jury, "if you find, from the evidence, there has been no full and complete administration of the assets of the estate, then this plea of defendant's fails, and your verdict may also be against the assets in his hands to be administered, or in default of such assets, against his personal goods." *Ibid.*
14. The executor in this case, having made himself personally liable, by his neglect, for the payment of complainant's legacy, before any law existed authorizing him to invest in Confederate securities without an order of Court, the charge complained of in the 33d ground for new trial is immaterial. *Ibid.*
15. An executor, who has willfully or negligently mismanaged the property in his charge to the injury of a legatee, cannot avail himself of the provisions of the Relief Act of October 13th, 1870, when sued by such legatee. *Ibid.*
16. Where land is "regularly advertised and sold at administrator's sale," (and the record states no more) and is afterwards levied on under a judgment obtained against the intestate in his lifetime, and the Court decides that the administrator's sale divests the judgment lien—to which judgment exception is taken—the plaintiff in error must show affirmatively that the estate was solvent, and the order of sale was not granted for the payment of debts, but for distribution only, in order to entitle him to a reversal of the judgment, even if this would do so. And as to this, we reserve our opinion. *Carhart et al. vs. Vann*..... 389
17. Where an executor is sued as such, in the county of his residence, and, pending the suit, dies, and administration *de bonis non*, is granted upon the estate of his testator, who lived and died in a different county, to a citizen of the county of the testator's residence, the suit against the executor does not abate, and a

<i>scire facias</i> issued to make the administrator <i>de bonis non</i> , a party to the suit, should not have been dismissed under the facts stated. <i>Walton vs. Gill, administrator</i> ..	600
<i>Leonard et al. vs. Same</i>	600
<i>Weekes, executor, vs. Same</i>	600

ADVERSE POSSESSION. See *Ejectment*, 1, 5.

AFFIDAVIT. See *Attorney*, 2.

AMBIGUITY. See *Evidence*, 5, 7.

AMENDMENT.

1. The counter-affidavit to proceedings to eject an intruder cannot be amended, nor can a second be made. *Paige vs. Dodson*..... 223
2. An attachment bond is amendable. *Long, executor, vs. Hood*..... 225
3. Where proceedings are instituted to establish a lost note, and suit is commenced after the rule *nisi* has issued, as allowed by section 3910 of the Code, and, pending the cause, the original note is found, it is not error to allow plaintiff to amend his declaration so as to sue upon the original note thus found, even though there may be some immaterial discrepancies between the original note and the copy which it was sought to establish. *Cheney et al. vs. Dalton*..... 401
4. The records of the Court of Ordinary are amendable so as to make them speak the truth, upon the proper steps being taken for that purpose. The fact that the Court had no jurisdiction to grant the order, which it is proposed to amend, cannot affect the motion to amend. If the jurisdiction did not exist, parties whose interests may be affected by the judgment can take advantage of the want of jurisdiction as well after as before the amendment, whenever and wherever it interferes with their rights. *Thompson et al. vs. Kimbrel et al.*.....
5. Upon a motion to amend the records of the Court of Ordinary, the only issue before the Court is, whether the amendment proposed will make the record speak the truth. Whether the original order was legal,

passed or not is irrelevant and impertinent to the issue. Nor can such order, if illegal, be set aside in this proceeding. The case is not altered where the motion is to rescind an order allowing the amendment. *Ibid.*

- i. An amendment of its records by the Court of Ordinary, upon an *ex parte* application, cannot affect the rights of any persons not parties to the proceedings. But if such persons afterwards come into Court and move to rescind the order of amendment, and, upon hearing all the parties, it appears that the amendment was a proper one to be made, the order granting it should be permitted to stand. *Ibid.*
- . An affidavit by an officer or employee on any steamboat, made under section 1969 of the Code, for the purpose of foreclosing a lien on such boat for any debt that the affiant may have against the owner or lessee of the boat, must state the name of the person or persons owing the debt, as well as comply with the other requirements of the statute. This is necessary to give the State authorities, who cannot proceed solely *in rem* in such a case, jurisdiction. And where the averment is, that demand was made upon the agent, it should state that the demand was made on the agent of the owner or lessee, as the case may be, and not on the agent of the boat. *Cape Fear Steamboat Company vs. Torrent et al.*..... 585
- . The affidavit being the foundation of the proceeding, the execution issued thereon must conform to it, and cannot supply its defects. Where the affidavit contains all the requirements of the law, the execution, if defective, may be amended so as to make it conform to the affidavit. *Ibid.*
- . A return of a sheriff upon a writ of attachment, which states that he served a named person "personally" with a summons of garnishment, may be amended so as to show that he served such person as president of a bank. If the summons of garnishment has been lost, and the sheriff is dead, the plaintiff, on motion to do so, should be permitted to prove, by *aliunde* testimony, that the summons of garnishment was directed to the person served as president of the bank. If the garnishee denies it, he can tender an issue which, if found in favor of the plaintiff, will entitle him to an order amending the return, "so as

to make the proceedings conform to the facts." *Mayer & Lowenstein vs. The Chattahoochee National Bank...* 606

APPEAL.

1. A *certiorari* does not lie, to correct the errors of a Justice of the Peace, in a judgment involving questions of fact, when the amount of the judgment is over fifty dollars. In such cases the remedy is by appeal, as provided by the Constitution of 1868. *Witkowski vs. Skalowski*..... 41
2. An appeal would, by section 3554 of the Code, lie from the verdict of the jury in the County Court, in a collateral issue, at the discretion of the Judge presiding in said Court. *Odom vs. Gill*..... 245

ARBITRAMENT AND AWARD.

1. An award having been made the judgment of the Court without objection, equity will not interfere to set it aside on account of fraud in the original cause of action, or of fraud in obtaining the complainant's consent to the arbitration, where all the facts were known at the time of the motion to make the award the judgment of the Court. *Clark et al. vs. Thurmond*..... 97
2. Where a suit was brought to the City Court of Augusta, for \$235 96, the jurisdiction of which does not extend to amounts under \$100, and the matters in dispute were referred to an arbitrator, and upon the return of the award, which was in favor of the plaintiff, for \$68 14, besides interest, a motion was made to dismiss the case for want of jurisdiction, as the plaintiff, by his own admission, only claimed \$81 96, it was proper in the Court to sustain the motion. *Clements vs. Painter*..... 496
3. The fact that exceptions were filed to an award which was made the judgment of the Court, does not render it inadmissible, the exceptions having been withdrawn. *McRory vs. Sellars*.....

ARREST.

1. The Act of incorporation of the city of Americus and the ordinance passed in pursuance thereof, authorizing the arrest and detention of violators of the ordinance

nances of said city, without warrant, are not unconstitutional. *Johnson vs. The Mayor and City Council of Americus et al.*..... 80

In case of an arrest without warrant, the prisoner should, without unreasonable delay, be conveyed before the most convenient officer authorized to receive an affidavit and to issue a warrant, and the imprisonment of the offender beyond a reasonable time for that purpose would be illegal. *Ibid.*

ATTACHMENT.

Sections 1543 and 1544 of the Revised Code, prescribing the punishment of any master of a vessel who shall throw, or permit to be thrown, from any vessel any stone, gravel or other ballast, into the waters of any bay or harbor in this State, make such an act an offense against the laws of the State, and the guilty party is to be tried and punished as in other misdemeanors. *Wallace vs. The State, for use, etc.*..... 199

The attachment provided for by section 1544, is only to secure and recover the fine to be imposed upon the conviction of the offender, and cannot be carried to judgment until after the guilty person has been tried and sentence passed, when judgment may be taken on the attachment for the amount of the fine affixed by the Judge. *Ibid.*

When the plaintiff's name is signed to an attachment bond by his attorney, the plaintiff's name should be followed by the words "by his attorney-at-law," to which should be added the attorney's name. *Long, executor, vs. Hood*..... 225

An attachment bond is amendable. *Ibid.*

Where the defendant has replevied the property attached, and has appeared and pleaded to the merits of the case, the plaintiff has the right to try the case as at common law. *Ibid.*

ATTORNEY.

When the plaintiff's name is signed to an attachment bond by his attorney, the plaintiff's name should be followed by the words "by his attorney-at-law," to which should be added the attorney's name. *Long vs. Hood*..... 225

2. An affidavit, probating a mortgage, taken before the attorney of the mortgagee, who is a Notary Public, is not a legal affidavit, and a mortgage recorded on such probate is not legally recorded. *Nichols vs. Hampton* 253
3. Where a plea had been filed to the plaintiffs' action setting up a legal defense thereto, and a trial was had in the absence of one of defendants' counsel, who was alone acquainted with all the facts of the defense, which resulted in a verdict for the plaintiffs; on its being made to appear that said counsel had leave of absence, a new trial should have been granted. *Rust, Johnston & Company vs. Ketchum & Hartridge*..... 534
4. A judgment will not be set aside for absence of defendant's counsel by leave of Court, and an announcement by the Court that none of the counsel's cases will be tried, except by consent, where it does not distinctly appear that such counsel was regularly retained in the case, he himself not being able to swear to it, and it does appear that the partner of the counsel, who was such at the time of the alleged retainer, is in Court and states that he knows of no defense, and it further appears that there is no counsel of record, that no plea is filed, and that there is a judgment by default which has not been opened. *Farmer vs. Perry* 543
5. Where a mortgage and notes secured by it placed in the hands of an attorney for foreclosure and suit, one of the conditions of which mortgage is, that the mortgagor shall pay all expenses of foreclosure, including attorney's fees, and the attorney takes the rule nisi, calling on the defendant to show cause why the mortgage should not be foreclosed for the amount due, and ten per cent. thereon as attorney's fees, and the attorney also commences a common law suit and gives written notice to the defendant not to settle or compromise with plaintiffs, except through the attorney; notwithstanding which the defendant does compromise the case with the plaintiffs, without the knowledge of the attorney, the latter is entitled to a rule absolute to the extent of his fees, in the absence of any cause shown to the contrary. *Jones vs. Groover, Stubbs & Company et al.*.....
6. The absence of defendant's counsel, by leave of Court on the day the rule absolute was taken, but who

left with plaintiff's counsel a written consent that the rule might be taken unless, before a certain day named, which had passed, a satisfactory settlement was had, is no ground for enjoining the levy of the execution issued upon the rule, especially where such injunction is not asked until after the return term of the execution has passed, and there is no allegation of the insolvency of the plaintiffs or their attorney, or of any good defense which could have been made to the rule. *Ibid.*

AWARD. See *Arbitrament and Award.*

BANKRUPT. See *Tax, 3.*

BANKS.

. When a note, payable at bank, is placed in a bank for collection, it is the duty of the bank to see to it that it is properly presented for payment, and on its dishonor, to have it duly protested, and notice given to the indorsers. *Georgia National Bank vs. Henderson*..... 487

. When a bill of exchange payable at....., was sent to a bank for collection, and the bank treating it as a bank check, and not entitled to days of grace, presented it for payment, and had it protested, etc., on the day of its maturity, without days of grace, by means of which the indorser was discharged, and it was in evidence, that the bank was notified by the indorser at the time, that he claimed the paper to have days of grace :

Tell, That the bank was liable to the person who deposited the paper for collection for damages, for its negligence in not presenting the check, as required by law, and causing notice of its non-payment to be given to the indorser. *Ibid.*

. A State bank, not specially authorized by its charter to do so, could not, in 1862, issue any of its bills, intended to be used as money, redeemable otherwise than with gold or silver coin. Where it did issue bills at that date, in the usual form, it is inadmissible in a suit on them by a *bona fide* holder, who did not receive them from the bank, but purchased them from others, to prove that they were intended by the bank

to be payable in Confederate currency, and were so understood by the community in which the bank was located. *Manufacturers' Bank of Macon vs. Lamar...* 5

BILL OF EXCEPTIONS.

See *Practice in Supreme Court*, 1, 2, 5.

BILL OF EXCHANGE.

See *Promissory notes*, 5.

BOND FOR TITLE.

1. Where F. and N. purchased land jointly from M., giving their notes for the purchase money and taking his bond for titles, and F. paid the whole of the purchase money, and N. having died, F. demanded the titles to be made to himself, and brought suit on the bond in the names of F. and N. for F.'s use:
Held, That as the purchase was joint and the bond joint, it was no breach of the bond to refuse to make titles to F. alone. *Field et al. vs. Martin*..... 9
2. The suit could not be maintained in the name of F. and N. for the use of F., N. being dead. *Ibid*.
3. A deed, or bond for titles to a tract of land, by its number in the State survey, binds the obligor to make title to the land within the boundaries of such survey, and if a part be sold off before the date of the deed, this is a breach of the bond, nor is this breach excused by the fact that the quantity sold off is small, and the bond describes the number, containing two hundred and two and one-half acres, more or less. *Smith vs. Eason*..... 316
4. Proof that the obligee in a bond for titles knew that the obligor was not the owner of the whole of the land described in the bond, is no reply to a plea of a breach, unless it appear that there was a mistake in the description. *Ibid*.

CARRIERS.

1. Where one sent to an Express Company, by a small negro boy, a slave, for transmission by the company to a distant point, a small paper box, three or four inches in size, tied with a string, which box contained a valuable diamond breast-pin, worth \$500, and no more.

was given to the company of the value of the box and its contents, and the box, when delivered by the Express Company to the consignee, did not contain the pin :

Held, That the failure to notify the company of the value of the box was, under the circumstances, a fraud upon the Express Company, and a verdict for the plaintiff, against the company, ought to be set aside as contrary to law. *Everett vs. The Southern Express Company...* 303

2. Where goods are shipped by railway, and arrive at their destination within the usual time required for transportation, and are there deposited by the company in a place of safety and held by them ready to be delivered on demand, their liability as common carriers ceases, (unless the custom of trade is shown to be otherwise as to delivery,) and that of warehousemen commences. *Southwestern Railroad Company vs. Felder..* 433

3. No notice to the consignee, where the goods arrive on time, is necessary to reduce the liability of the company from that of common carriers to that of warehousemen. *Ibid.*

4. If the goods arrive out of time, and after they have been demanded by the consignee, it might require notice of their arrival to the consignee, and a reasonable time after, to relieve the company from the extraordinary liability imposed by law upon a common carrier. *Ibid.*

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CERTIORARI.

1. A *certiorari* does not lie to correct the errors of a Justice of the Peace, in a judgment involving questions of fact, when the amount of the judgment is over fifty dollars. In such cases the remedy is by appeal, as provided by the Constitution of 1868. *Witkowski vs. Shalowski*..... 41
2. The evidence offered by plaintiff sustains the judgment, and the mere inversion of the order of admitting the proof will not warrant the issuing of the writ of *certiorari*. *Urquhart vs. Urquhart*..... 415
3. The written notice required by section 3987 of the Code, to be given by the plaintiff in *certiorari* to the opposite party in interest, need not appear of record, if there is a waiver in writing of the notice. *New vs. LeHardy*..... 616

CHARITIES.

1. Under the Revised Code of this State, our Courts of chancery have jurisdiction to carry into effect charitable bequests, the objects of which are definite and specific, and capable of being executed. *Newsom, Ordinary, et al., vs. Starke, administrator, et al.*..... 88
2. In determining what bequests for charitable purposes are definite and specific and capable of being executed, the Court is to be guided by the well settled rules of the Court of chancery in England in the exercise of its inherent chancery jurisdiction over charities as distinguished from its jurisdiction as the agent of the King in the exercise of his prerogative power to direct and give effect to indefinite charitable bequests. *Ibid.*
3. A bequest to the Inferior Court of a county of a sum of money to be placed in the hands of four men, who are to give bond and security, whose duty it shall be to loan out said amount and pay over the interest

annually to the Inferior Court, to pay for the education of poor children belonging to the county, and providing that no part of the principal shall be used for that purpose, is, according to the well settled rules for the exercise of the inherent power of a Court of chancery over charities, sufficiently definite and specific in its objects and sufficiently capable of execution to authorize and require our Courts of chancery to give it effect. *Ibid.*

4. It is the duty of the Inferior Court, on its acceptance of the trust, in such case, to appropriate the money, as directed, and if any difficulties arise, or any uncertainties exist, as to the precise objects, or as to the mode of applying the fund, to apply to the Chancellor, who will direct by decree, the leading details of the scheme to be adopted. *Ibid.*

CHECK. See *Promissory Notes*, 5.

CIRCUMSTANTIAL EVIDENCE.

See *Criminal Law*, 29.

CLAIMS.

To make one a "claimant" of the property, within the meaning of section 5 of the Act of October 13, 1870, so as to be permitted to file the counter-affidavit therein provided for, he must put in a claim to the property, under the claim laws of this State. *Adams vs. Worrell*..... 295

CLERK OF SUPERIOR COURT.

See *Ordinary*, 1.

CONFESSIONS. See *Criminal Law*, 23.

CONSTITUTIONAL LAW.

1. It is competent for the General Assembly to grant to a foreign corporation the privilege to construct a telegraph line upon the public domain, provided it does not authorize said corporation to take private property for that purpose without providing that just compensation shall be paid to the owners thereof. *Southern Railway Company et al. vs. Southern Atlantic Telegraph Company*.....

2. The Act of the General Assembly of the State of Georgia, approved August 26th, 1872, entitled "An Act to empower and authorize telegraph companies in this State to construct their lines upon the right of way of the several railroad companies in this State," is unconstitutional and void, for the reason that it fails to provide any compulsory process for the enforcement of the payment of just compensation for private property taken under its provisions. *Ibid.*
3. The Act of incorporation of the city of Americus, and the ordinance passed in pursuance thereof, authorizing the arrest and detention of violators of the ordinances of said city, without warrant, are not unconstitutional. *Johnson vs. Mayor and City Council of Americus.....* 80
4. In case of an arrest without warrant, the prisoner should, without unreasonable delay, be conveyed before the most convenient officer authorized to receive an affidavit and to issue a warrant, and the imprisonment of the offender beyond a reasonable time for that purpose would be illegal. *Ibid.*
5. The Legislature has authority to appoint, by resolution, a committee of their own body, as ministerial agents, to audit and state the accounts of the officers and agents of the Western and Atlantic Railroad. Where such statement shows an officer or agent in default, and is transmitted by the committee to the Comptroller General, and he thereupon issues executions against the defaulting officer and his sureties, this Court will presume that he has satisfied himself of the correctness of the committee's report by inspection of the books and accounts of the Western and Atlantic Railroad, and adopted it as his own. *Scofield et al. vs. Perkerson et al.....* 325
Hinton et al. vs. Same..... 325
6. The issuing of executions by the Comptroller General, to collect the public revenue due to the State, is the act of the Executive department of the Government; and the Courts have no power to prescribe the kind or sufficiency of the evidence which shall be necessary to authorize the process of execution to issue against defaulting officers or agents, or to restrain that department in pursuing this course. *Scofield et al. vs. Perkerson et al.; Hinton et al. vs. Same.....* 350

CONTINUANCE.

1. The absence of a party not legally interested in the result of a case, is no ground of continuance. *Allen et al. vs. Lathrop & Company*..... 13
2. The evidence of the absent witness being inadmissible or immaterial, the continuance was properly refused. *Lynes vs. The State*..... 20
3. This Court reluctantly interferes with the discretion of the Court below in granting or refusing a continuance, and, in this case, there was no abuse of that discretion which will authorize this Court to control it. *Ibid.*
4. When a motion is made for a new trial on the ground that the Court erred in refusing to continue the cause on a showing by the party complaining that a material witness is absent, and the Judge overrules the motion, this Court will scan the showing very closely, and will not interfere unless there is a complete compliance with the rules of Court. *Wardlaw vs. McConnell, executrix*..... 273
5. The motion for a new trial in this case was properly overruled, the verdict not being decidedly and strongly against the weight of evidence, and the discretion of the Court as to the continuance, not having been, in our opinion, abused. *Cohen vs. Weigle*..... 438

CONTRACT.

1. Where the language of an instrument in writing is ambiguous, and may be fairly understood in more ways than one, it should be taken in the sense put upon it by the parties at the time of its execution, and the Court will hear evidence as to the facts and surroundings, and decree according to the truth of the matter. *Armistead vs. McGuire*..... 232

CONTRACTORS. See *Railroads*, 2.

CONTRIBUTION.

1. Under the provisions of the Revised Code, sections 2738, 2739 and 2123, accommodation indorsers of a negotiable security, payable at a chartered bank, considered as securities merely, and if one pays on the

debt he can compel the others to contribute. *Freeman vs. Cherry*..... 14

CONVERSION. See *Trover*, 1.

CORPORATIONS.

1. In the absence of any fraud or collusion on the part of the railroad company, the mere transfer of the stock on the books thereof to the purchaser, by the direction of the administrator, will not make the company liable as a guarantor or warrantor of the vendor's title to the stock. *Nutting et al. vs. Thomason et al.* 34

See *Municipal Corporations*.

COSTS.

1. The conditional affirmance of the judgment of the Superior Court by this Court, which requires the defendant in error, who was plaintiff below, to write off a portion of the verdict, the whole amount of which was in controversy, does not entitle the plaintiff in error to enter judgment in the Court below for the costs incurred in the Supreme Court when the defendant in error complies with the condition. *Smith vs. Turnley, administrator*..... 454

COUNTY COURT. See *Appeal*, 2.

COUNTY MATTERS.

1. The declaration of a plaintiff who sues on a written contract must set forth a complete and valid contract, even when suit is brought under Jones' form of pleading. Therefore, in a suit against a county on a bond given, after the adoption of the Code, by the Justices of the Inferior Court, the pleadings must show, affirmatively, that the contract was entered upon the minutes of the Inferior Court. Without such entry, the contract would not be valid, under section 527 of the Code, if good in other respects. *Pritchett, administrator, vs. Inferior Court of Bartow county*..... 462

COVENANT.

1. Where to a deed the words, "On the express understanding and agreement on the part of said A. H. S.

- (the grantee) that the lot of land so conveyed is never to be sold to or occupied by negroes," are attached, they are words of covenant and not of condition. *Anthony et al. vs. Stephens et al.*..... 241
2. Where A and B entered into a written contract, in which A agrees to sell and make a fee simple title to B to a parcel of land, and B agrees to pay to A, \$800 in cash on a fixed day thereafter, and to give on that day his note for \$300, due one year thereafter, and B took possession of the land:
Held, That the covenants of A to make the deed, and of B to pay the money, were mutual and dependent covenants, and an action would lie in favor of A for the money on his offer to perform, and B thereupon failing or refusing to pay the money. *Booth vs. Saf-fold*..... 278
3. In mutual covenants of this character, it is not necessary that a formal tender shall be made by either party. If one offers to perform his part of the covenant and the other refuses, the right of action is complete, and it is not necessary that the party offering to perform shall prepare the deed and tender the same. *Ibid.*

CROPS. See *Homestead*, 4.

CRIMINAL LAW.

1. On the trial of an indictment for keeping a lewd house, under section 4462 of the Code, it is not necessary to show that the master of the house kept the same for profit. It is sufficient if it appear that the lewdness carried on was with his permission or in his presence, without his dissent. *Scarborough vs. The State*. 26
2. A man is guilty of keeping a lewd house, within the meaning of section 4462 of the Code, if open and notorious lewdness is practiced therein by his wife and daughters, in his presence, with his consent or without his dissent. *Ibid.*
3. It is not an expression of opinion by the Judge, as to what has been proven on the trial of an indictment for keeping a lewd house, to say to the defendant's attorney, (who is addressing the Court upon the law of the case,) in reply to the claim of the attorney, that

there must be proof that the defendant kept the house for profit: "It makes no difference whether he keeps it for profit or pleasure, he is guilty." *Ibid.*

4. When the State's counsel in a criminal case, in addressing a jury, is making statements not in proof, and one of the defendant's counsel objects, but another says let him go on, it is not a ground for new trial, if the Judge fail to interfere until the matter is again insisted upon by the defendant's counsel; nor will the verdict be set aside because the Judge, in his charge, fails to say to the jury that they are not to notice such statements, there being no request for such a charge. *Ibid.*
5. On the trial of an indictment for murder, where there is a general plea of not guilty, it is not error as against the prisoner for the Judge to charge the jury as to the law of justifiable homicide, even though, from the evidence, it is plain that the prisoner is, in any event, guilty of manslaughter. An error of the Court, in his charge to the jury, which could not, in any view of it, have injured the prisoner, under the evidence, is no ground for a new trial. *Tate vs. The State.....* 148
6. When the evidence showed that, without any considerable provocation, the prisoner "went at the deceased with an axe," and the deceased, standing in his place, picked up a heavy oak stick, and was stricken by the prisoner with the axe and killed as he was raising the stick, and the Judge charged the jury that if the deceased picked up the stick to defend himself, the prisoner was guilty of murder; but if the deceased picked it up for *mutual combat*, the prisoner was guilty only of manslaughter; and the jury found the defendant guilty of murder:
Held, That the charge was not one of which the prisoner could complain. *Ibid.*
7. There need not be mutual blows to constitute a mutual combat. *Ibid.*
8. There must be a mutual intent to fight, and if this exists, and but one blow be stricken, the mutual combat exists, even though the first blow kills or disables one of the parties. *Ibid.*
9. In a case where, if death had ensued, the defendant would only have been guilty of manslaughter, he

- cannot be convicted of an assault with intent to commit murder, and the Court, on request, should so have charged the jury. *Elliott vs. The State* 159
10. Sections 1543 and 1544 of the Revised Code, prescribing the punishment of any master of a vessel who shall throw, or permit to be thrown, from any vessel any stone, gravel or other ballast, into the waters of any bay or harbor in this State, make such an act an offense against the laws of the State, and the guilty party is to be tried and punished as in other misdemeanors. *Wallace vs. The State, for use, etc* 199
11. The attachment provided for by section 1544, is only to secure and recover the fine to be imposed upon the conviction of the offender, and cannot be carried to judgment until after the guilty person has been tried and sentence passed, when judgment may be taken on the attachment for the amount of the fine affixed by the Judge. *Ibid.*
12. Under the provisions of the Constitution of 1868, commissioned Notaries Public are clothed with judicial powers, they are *ex officio* Justices of the Peace, and are embraced within the 4432d section of the Code, which provides for the indictment and punishment of Justices of the Peace for malpractice in office. *Lynes vs. The State* 208
13. In cases of misdemeanors, the joinder of several offenses in the indictment will not, in general, vitiate the proceedings at any stage of the prosecution. *Ibid.*
14. Where the defendant is charged with three distinct acts of malpractice, in three distinct counts, all being of the same grade of misdemeanor, and the jury returned a verdict of not guilty on the first count, but guilty on the second and third, the verdict was a general one. *Ibid.*
15. The evidence of the absent witness being inadmissible or immaterial, the continuance was properly refused. *Ibid.*
16. The defendant having been furnished with a copy of the indictment before it was sent before the grand jury, it was not error in the Court to refuse to direct him to be furnished with a second copy. *Ibid.*

. When, on the trial of an indictment for "burglary in the night time," the jury, after retiring, returned into Court and asked if they could find the defendant guilty of any other offense than that charged in the bill of indictment, and the Court informed them "that they could not; that they must find him guilty or not guilty of burglary in the night time," and the jury found the defendant "guilty:"

Id., That this instruction of the Court to the jury was not such as the prisoner could complain of, and the evidence being such as to justify the verdict, a new trial ought not to be granted. *Williams vs. The State.* 212

. When, on the trial of an indictment for an assault with intent to murder, it was discovered, after the argument to the jury had been begun, that there was a variance between the proof and the indictment as to the name of the person charged to have been assaulted, it was not error in the Court to permit the State to call witnesses to prove that the person named was known as well by the name mentioned in the indictment as by that mentioned in the proof. *Johnson alias Rogers vs. The State*..... 269

. It is competent for the State to show on the trial of an indictment for assault with intent to murder, that the person assaulted was known by the name mentioned in the indictment, and also by another name, even though the indictment does not allege that he was known by the two names. It is a matter of description and does not stand on the footing of a misnomer of the defendant. *Ibid.*

. Where a defendant is on trial for carrying concealed weapons, evidence as to his motive in placing the pistol in his pocket is inadmissible. *Morton vs The State*..... 292

. It was not error in the Court to charge "that the question for the jury to determine upon the evidence was, whether the defendant had or carried about his person a pistol, not being a horseman's pistol, and not being had or carried about his person in an open manner, and fully exposed to view, that if he so had, as charged in the indictment, the time that he so had, it was not important; if he for any length of time, however short, for a moment so had it contrary to law, he was guilty of the offense, otherwise not." *Ibid.*

22. An accessory before the fact to the crime of arson cannot be put upon his trial until after the conviction of the principal felon, at least not without some special reason recognized by law, showing why the principal has not been tried. *Smith vs. The State*..... 298
23. The confessions of a principal felon, as to his own guilt, are competent evidence to show that fact on the trial of the accessory, but the confessions must be such as would be competent evidence on the trial of the principal, and must not be induced by another with the slightest hope of benefit or remotest fear of injury to the party making them. *Ibid.*
24. Burglary is the breaking and entering the dwelling house of another with intent to commit a felony or a larceny, and the indictment must allege such intent. It is not sufficient in an indictment for burglary to allege that the defendant broke, etc., and having so entered did steal certain goods. *Wood vs. The State.* 322
25. A fatal defect in an indictment cannot be taken advantage of by directing the jury to find a verdict of not guilty. The proper method before verdict is to demur, or after verdict to move in arrest of judgment. *Ibid.*
26. A motion for a new trial on the ground that the indictment is fatally defective, though not strictly proper, will be sustained under the practice in this State. *Ibid.*
27. Upon the trial of the defendant for an assault and battery, it was not error in the Court to charge the jury, "that if they believed the prosecutor used insulting and abusive language to the defendant, it might or might not amount to a justification, depending upon the extent of the battery, and if they believed, from the evidence, that the defendant used the first insulting and opprobrious words, they might take that into consideration in determining whether the defendant was justified in making the alleged assault." *Arnold vs. The State*..... 456
28. A written accusation in the County Court, charging the defendant with employing the servants of another, must state the name of the person in whose employ the servants were at the time of such illegal act, and if the defendant employed the servants by an agent,

- the name of such agent must be set forth. *Hudson vs. The State*..... 624
29. Circumstantial evidence to warrant a conviction of one accused of a crime, must be so strong as to exclude every other reasonable hypothesis than that of the prisoner's guilt of the offense with which he is charged. *Carter vs. The State*..... 637
30. Newly discovered evidence tending to prove a fact material to the issue, and about which the defendant had offered no testimony on the trial, and he is chargeable with no want of diligence, entitles him to a new trial. *Ibid.*
31. Where, upon the trial of the defendant for the offense of an assault with intent to murder, the jury returned a verdict finding "the defendant guilty of an assault with intent to kill," and upon being remanded to the jury-room, with instructions from the Court, returned a general verdict of "guilty," a motion in arrest of judgment, based upon the facts aforesaid, was properly overruled. *Williams vs. The State*..... 647

CUSTOM. See *New Trial*, 7.

DAMAGES.

1. When there is a sale of goods, with a warranty of quality, and a delivery and acceptance by the buyer, and the goods prove not to correspond with the warranty, and there is no fraud by the seller, the measure of damages is the difference between the price paid and the value of the goods as they actually were at the time and place of the sale and delivery, together with such consequential damages, if any there be, as come within the rule, excluding indirect and speculative damages. *Clark & Company vs. Neufville*..... 261
2. The verdict in this case is fully sustained by the evidence, and this Court will, in its judgment, award damages against the plaintiff in error, on the ground that the case was brought up for delay only. *Mercier vs. Mercier*..... 643

DAYS OF GRACE. See *Promissory Notes*, 5.

DECLARATION. See *Pleading*, 1, 3, 5, 6, 8.

DECREE. See *Equity*, 4, 8, 12, 13.

DEED.

1. The recital in an administrator's deed, executed on the 3d day of December, 1861, that leave to sell the land was granted in November last past, is notice to the purchaser that the requirement of the law, as to forty days' public notice of the sale, had not been complied with. *Groover et al. vs. King*..... 101
2. Where to a deed the words, "On the express understanding and agreement on the part of said A. H. S., (the grantee) that the lot of land so conveyed is never to be sold to or occupied by negroes," are attached, they are words of covenant and not of condition. *Anthony et al. vs. Stephens et al.*..... 241

DISTRESS WARRANT.

See *Landlord and Tenant*, 1, 2, 3, 4, 5, 6.

DIVORCE. See *Husband and Wife*, 2.

DOMICIL.

1. The domicile or residence of a person of full age, and laboring under no disability, is the place or county where the family of such person shall permanently reside, if in this State, and suit should be there instituted against him. *Daniel vs. Sullivan*..... 277
2. Where an executor is sued as such, in the county of his residence, and, pending the suit, dies, and administration *de bonis non*, is granted upon the estate of his testator, who lived and died in a different county, to a citizen of the county of the testator's residence, the suit against the executor does not abate, and a *scire facias* issued to make the administrator *de bonis non* a party to the suit, should not have been dismissed under the facts stated. *Walton vs. Gill, administrator; Leonard et al. vs. same; Weeks, executor, vs. same*.....
3. Where it appears that a widow, with minor children, whose father died in this State, married a second time, and she and her husband, after living in the county of her first husband's residence for some time, left the

State, taking the minors with them, but frequently avowed, and still avow, their intention of returning to their former home, which they claim never to have abandoned, and application is made, in behalf of the minors, for homestead out of their father's estate, by next friend, in the county in which the father died resident, and objection is filed by a creditor of the father, on the ground that the minors are not citizens of Georgia, and, therefore, not entitled to a homestead, and the jury, on appeal from the Ordinary who granted the homestead, affirm his judgment:

Held, That the question of domicile was one of fact under the circumstances, and the jury having found in favor of the minors' right to a homestead, this Court will not disturb the verdict which is warranted by the evidence. *Harkins vs. Arnold*..... 656

DOWER. See *Homestead*, 7.

EASEMENT.

1. If a parol agreement, in relation to the building of a party-wall, has been fully executed by both parties, it creates an easement which attaches to and runs with the land. *Rawson vs. Bell* 19
2. Where the defendant, having contracted with the plaintiff to pay for so much of a party-wall as he used when he built, conveys his lot to a third person, having thus put it out of his power to build, he becomes liable to the plaintiff. *Ibid*.
3. As no time was specified within which the defendant was to build and pay the plaintiff for one-half of the wall to be used by him, the law will imply that it was to be done within a reasonable time. *Ibid*.

EJECTMENT.

1. Where a prescriptive title is set up in defense to an action of ejectment, it is competent for the defendant to show the good faith with which he purchased. *Horne et al. vs. Howell* 9
2. An action of ejectment is not strictly an action for a *tort*, but is a mixed action, partly and nominally for a *tort*, but mainly to try title to land. *Lopez vs. Downing, administrator, et al*..... 120

3. Where, in a declaration in ejectment, the ouster is alleged as occurring since the 1st of June, 1865, but the proof shows the defendant to have been in possession before the first of June, 1865, the action is not barred by the Act of March 16th, 1869, because not brought within three months after the 16th March, 1869. *Ibid.*
4. No damages or *mesne* profits can be recovered behind the 1st of June, 1865, but the defendant, if he defends by his possession under color alone, must show that possession to have been continued seven years before bringing the suit. *Ibid.*
5. The statement of the overseer of defendant, who was in possession of the land, and managing his property for him as his agent, as to the reason why a fence was located in a peculiar manner, is admissible to prove the adverse possession of the defendant. *Shipp et al. vs. Wingfield, executor* 593

EMINENT DOMAIN.

See *Constitutional Law*, 1, 2.

EQUITABLE MORTGAGE. See *Mortgage*, 3.

EQUITY.

1. Under the Revised Code of this State, our Courts of chancery have jurisdiction to carry into effect charitable bequests, the objects of which are definite and specific, and capable of being executed. *Newsom, Ordinary, et al., vs. Starke, administrator, et al.* 88
2. In determining what bequests for charitable purposes are definite and specific, and capable of being executed, the Court is to be guided by the well settled rules of the Court of chancery in England in the exercise of its inherent chancery jurisdiction over charities as distinguished from its jurisdiction as the agent of the King in the exercise of his prerogative power to direct and give effect to indefinite charitable bequests. *Ibid.*
3. A bequest to the Inferior Court of a county of a sum of money to be placed in the hands of four men, who are to give bond and security, whose duty it shall be to loan out said amount and pay over the interest annually to the Inferior Court, to pay for the education

of poor children belonging to the county, and providing that no part of the principal shall be used for that purpose, is, according to the well settled rules for the exercise of the inherent power of a Court of chancery over charities, sufficiently definite and specific in its objects and sufficiently capable of execution to authorize and require our Courts of chancery to give it effect. *Ibid.*

4. It is the duty of the Inferior Court, on its acceptance of the trust, in such case, to appropriate the money, as directed, and if any difficulties arise, or any uncertainties exist, as to the precise objects, or as to the mode of applying the fund, to apply to the Chancellor, who will direct, by decree, the leading details of the scheme to be adopted. *Ibid.*

5. When a case was dismissed in this Court for want of prosecution, and it appeared in a bill, filed in the Court below for a new trial, that the plaintiff's counsel had been misled by a statement of the defendant's counsel, to the effect that, under the rules of this Court, the case would be put at the heel of the whole docket, on agreement of counsel, and at the request of said defendant's counsel, and solely for his convenience he had so agreed, and had, in consequence, not appeared at the calling of the case, all of which was admitted by said defendant's counsel, who assumed the whole blame of the non-appearance, and admitted that the plaintiff was in no *laches*:

Held, That, as the motion for a *new trial* was meritorious, and the fault of its miscarriage was with the defendant in error, by his own admission, the Court should have sanctioned the bill. *Hughes vs. Coursey.* 115

6. Mere inadequacy of price, or any other fact tending to show that the contract was unfair, unjust or against good conscience, will justify a Court of equity in refusing to decree a specific performance. *Christian vs. Ransome*..... 138

7. When the defendant, in a suit at law, sets up a legal defense, and the plaintiff desires to reply some equitable matter, he may do so, but he must amend his declaration so as to plainly and distinctly set forth such equitable reply. *Smith vs. Eason*..... 316

8. Where a legatee files a bill against the executor of the will under which the complainant claims, to compel

the payment of his legacy and the executor sets up the defense of *plene administravit præter*, which is controverted by the complainant and the jury found the following verdict: "We the jury find the sum of \$5,000, with legal interest thereon, from the 24th day of November, 1855, for the complainant, John Anderson, to be raised out of the estate of A. H. Anderson, deceased, in the hands of Moses P. Green, executor," the complainant is entitled to a judgment *de bonis testatoris et si non de bonis propriis*. *Anderson vs. Green, executor*..... 361

9. The decree of the Chancellor should conform to the verdict. Where a decree was rendered by the Chancellor not conforming to the verdict and pending a motion by defendant for a new trial, complainant excepted to the decree rendered and brought the case to this Court, where the bill of exceptions was dismissed, as prematurely sued out, and at the hearing of the motion for a new trial, complainant again moved to reform the decree, so as to make it accord with the verdict, which motion to reform the Chancellor again entertained and overruled, and also granted the new trial, to all of which complainant excepted within the thirty days required by the statute, he is not estopped from assigning error upon the ruling of the Chancellor refusing to reform the decree. *Ibid.*

10. A portion of an answer which is not responsive to the bill is not evidence for the defendant. *Ibid.*

11. When A loaned money to B, to be used by B in rebuilding a certain mill of B's, which had been destroyed and was being rebuilt, and it was understood that A was to have a lien on the mill to secure him, but no writing or other written memorandum was made, except the giving of notes for the money, and there was no charge of accident, fraud or mistake by which the execution of such writing was prevented:

Held, That after B's death, on a bill to marshal his assets, equity will not set up in favor of A a lien on the mill, to the prejudice of the other creditors of B. *Printup vs. Barrett, administrator*.....

12. When a mortgage of realty in Georgia, is executed in New York before a Commissioner of Deeds only, without any other witness, a Court of chancery

- jurisdiction to reform and foreclose the mortgage.
McCrary & Co. vs. Austell, Inman & Co...... 450
13. Where a bill was filed by the legatees of an estate against the executors, praying an account and settlement, and the jury find in favor of two of the complainants only, directing certain specific assets on hand to be turned over to them saying nothing about the other complainants:
Held, That, as in equity, the jury may find a special verdict, this verdict is not void, as not disposing of the issues. *Shell et al., executors, vs. Sanders et al.*.... 469
14. The Chancellor may, in the final decree, dispose of the whole case in accord with the verdict, and it is, therefore, sufficient. *Ibid.*
15. Where, on the trial of a bill for account and settlement in favor of the legatees of an estate against the executors, the jury found that one of the executors was not liable to the legatees at all, and the verdict directed certain notes and assets to be turned over by the other executor to the legatees, and two of these notes were the notes of the executors, made by them as memoranda of moneys belonging to the estate, used by them:
Held, That the verdict was illegal. The jury should have found against the executors a money verdict for the amount of the notes, and it was right in the Court to grant a new trial. *Ibid.*
16. A defendant in a suit at common law cannot, by plea, set up an equitable defense and obtain a decree in his favor, where a Court of chancery would refuse it, on a bill filed by him for the purpose, for want of proper parties. Hence, if a guardian sue a corporation for dividends belonging to his ward, the company cannot, by an equitable plea, avail themselves, as a defense of the fact, that they paid the dividends to one not authorized to receive them, and that the money was applied to the support of the ward by the person receiving it, that person not being a party to the suit. *South-western Railroad Company vs. Chapman, guardian.*.... 538
17. Where a bill in equity was filed by a railroad company, alleging that it had paid the dividends on certain shares of stock belonging to a minor, to the mother of the minor, the father being dead; that the mother had

appropriated the money paid to the necessary uses and expenses of the minor; that a guardian of the minor had been subsequently appointed who had brought suit against the railroad, and obtained a judgment for the dividends; that on the trial of the suit this defense of the company had been disallowed by the Court on the ground that it was not a good defense at law, since the mother was not a party to the suit; that final judgment had given a lien against the company in favor of the guardian, who was about to proceed to collect the money by execution; that the mother was insolvent, and that no accounting had been had between the guardian and the mother, for the expenditures for which this money was used; and the bill prayed that the judgment at law might be enjoined, until an account should be taken, as to the amount due from the ward's estate to the mother, for said expenditures, and that the amount, when found, should be applied to the judgment:

Held, That the Judge ought to have granted the injunction. *Southwestern Railroad Company vs. Chapman, guardian*..... 557

18. Where property is levied on which is claimed by complainant to have been released from the lien of the execution by a written contract, and the terms of said agreement are ambiguous, and the affidavits as to the intention of the parties read on the hearing of the motion for injunction, are conflicting, this Court will not interfere with the discretion of the Chancellor granting an injunction. *Kendall et al. vs. Dow*..... 607

19. Equity will interfere by injunction where it will prevent a multiplicity of suits and quiet the title to a number of lots of land by one final decree. *Ibid.*

ESTATE. See *Will*, 2.

ESTOPPEL.

1. Although the minor heirs of the intestate may have had a guardian who receipted to the administrator for their portion of the proceeds of the land, without any knowledge of the illegality of the sale, yet they were not estopped from asserting their claim to the land, when they obtained a knowledge of such illegal sale.

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- they accounting for the money received. *Groover et al. vs. King*..... 101
2. Estoppels are not favored by the Courts. *Ibid.*
3. A mortgagor is estopped from denying his own title to the property mortgaged, and third parties claiming title to the land cannot at law make themselves parties to the proceedings to foreclose for the purpose of asserting their rights. The judgment is between the parties to the mortgage, and binds them, and them only. *Allen et al. vs. Lathrop & Co*..... 133
4. Probate of a will in common form unattacked for seven years, is conclusive, upon all parties in interest, except minor heirs-at-law. *Anderson vs. Green, executor*..... 361
4. A legatee is not barred from asserting his claim to a legacy against the executor where suit is brought within ten years after the legatee arrives at age. *Ibid.*
6. Where a will has been proved in common form for more than seven years, a legatee does not waive the estoppel thereby created by filing his bill against the executor for an account and discovery. *Ibid.*
7. Where a testator, in 1854, made his will, by which he left certain land to his son, whom he appointed executor, and in 1856 conveyed the land to his son by deed, reserving a life estate to himself, and delivered the deed to his son, the legacy is adeemed. If, on the death of the testator in March, 1864, the son takes immediate possession of the land, claiming it under the deed, and in January, 1865, prove the will and qualify as executor, but does not return the land as part of his father's estate, he is not estopped by the probate and his qualification as executor, without more, from setting up his title under the deed adverse to the will. *Worrill, administrator, et al. vs. Gill, administrator*..... 482
8. Where a rule *nisi* to foreclose a mortgage alleged that the mortgage was executed by a partnership to a parcel of land, and that the proceedings were against one as surviving partner, the other being dead, and the surviving partner filed a plea, setting forth that the land included in the mortgage was not partnership property, though owned by the partners as tenants in

common, and the plea was demurred to and the demurrer sustained :

Held, That as there was no denial that the mortgage to the property was made by the partners, as such, and as, if this were so, it would estop the parties from denying title in the partnership, the plea was properly overruled. *Roberts vs. Administrators of Oliver* 547

9. A settlement between two partners, whereby one buys the other's interest in the partnership property, and gives his note for the amount found to be due the retiring partner, does not estop the maker of the note from pleading and showing, when sued on the note, that it was given for too much, by mistake, arising out of an erroneous charge against the maker of the note in the settlement. The fact that the maker received the note after discovery of the mistake by him, and while it was a matter of dispute, still insisting that it existed, does not vary the rule. *Herty vs. Clark*..... 649

EVIDENCE.

1. A paper, signed by the Ordinary, purporting to grant to an administrator leave to sell the land of the estate which he represented, which had never been recorded or entered on the minutes of the Court, and without proof that such order had been granted, at a regular term of the Court of Ordinary, is inadmissible in evidence. *Groover et al. vs. King*..... 101
2. Where there was a written contract, by which a railroad company leased its property to another, signed in duplicate, the company having one copy and the lessee the other, it is not competent to prove the contents of said instrument upon the statement of the witness that he had applied to the officers of the company in New York for their copy and had failed to obtain it, as it was mislaid, but had not applied to the lessee for his copy, the proof being offered in a proceeding against said lessee. *Breed vs. Nagle*..... 112
3. The Courts are bound to take judicial cognizance of the fact that the county of DeKalb is located within the State of Georgia. *Wright vs. Phillips*. 127
4. Where the bill of particulars attached to the affidavit consisted of a due bill for the amount claimed, made

by Wall, it was competent for plaintiff to show that it was given for the services specified in the affidavit, that Wall was in possession of the mill at the time of the foreclosure of the lien, and of the levy of the execution thereon. *Ibid.*

5. Where the language of an instrument in writing is ambiguous, and may be fairly understood in more ways than one, it should be taken in the sense put upon it by the parties at the time of its execution, and the Court will hear evidence as to the facts and surroundings, and decree according to the truth of the matter. *Armistead vs. McGuire*..... 232
6. When a suit was brought on a promissory note, signed by one claiming to be the agent of the defendant, and there was some evidence that the defendant had accepted, knowingly, the consideration for which the note was given :
Held, That it was error in the Court to rule out the note as evidence. The case should have been submitted to the jury, under the charge of the Court, as to the effect of the defendant's act, should they believe he had accepted, knowingly, the consideration for which the note was given. *Gilbert vs. Dent*..... 238
7. Where there is no ambiguity on the face of a will, parol evidence is inadmissible to explain it. *Hill et al. vs. Alford*..... 247
8. Implied trusts are not within the statute of frauds, and the Courts will hear parol evidence, showing the facts from which they are sought to be implied. *Alexander, executrix, vs. Alexander*..... 283
9. The confessions of a principal felon, as to his own guilt, are competent evidence to show that fact on the trial of the accessory, but the confessions must be such as would be competent evidence, on the trial of the principal, and must not be induced by another with the slightest hope of benefit or remotest fear of injury to the party making them. *Smith vs. The State*..... 298
10. A portion of an answer which is not responsive to the bill is not evidence for the defendant. *Anderson vs. Green, executor*..... 361
11. On the investigation of an issue of *devisavit vel non*, where one of the grounds of the caveat is, that the

executor did, by fraud and deceit, and fraudulent and false representations, procure the testator to make the will, the admission of the executor, who takes an interest under the will, made after qualification, in reference to the conduct or acts of the executor himself, as to a matter relevant to the issue, (and his statement that he had procured the testator to make the will for certain purposes is such,) should have been admitted as evidence in chief. The fact that such evidence was admitted in rebuttal to impeach the executor, who testified as a witness in favor of the will, is not the full measure of the rights of the caveators, and they are entitled to a new trial on account of the rejection of this testimony as evidence in chief. *Dennis et al. vs. Weekes*. 514

12. Where one of the grounds of caveat is undue influence exercised by the executor of the testator, in procuring him to make the will, evidence showing that the executor, as agent of the testator in 1863 or 1864, applied to the Confederate conscripting officer to have a white man exempted from military service for the purpose of overseeing the plantation of the testator, on the ground that the latter was so unsound in mind as to be incapable of attending to his own business, is admissible as evidence in chief for what weight the jury may give to it, to show the executor's knowledge of the state of the testator's mind, where the evidence, with the exception of that of the executor himself shows that the executor exerted his influence over the testator (which was proved to be very great) to have the will made, and all the witnesses testify that the testator had been a man of very weak, if not entirely unsound mind for fifteen years before his death, which occurred in 1869. *Ibid.*
13. Evidence which ought properly to have been offered in chief, but which was then omitted through inadvertance, if offered with the rebutting evidence, should be admitted if otherwise unobjectionable. *Ibid.*
14. The paper in the handwriting of the executor, made in 1857, showing the amount of property in his hands as agent of the testator, was proper evidence in chief, as tending to show the amount of interest taken by the executor under the clause of the will which relieved him from the payment of any balance then

might be found due by him to the testator, other than that with which he is charged in the will, and should have been admitted with the rebutting evidence, where it was inadvertently omitted to be given in, in chief.
Ibid.

15. The record book of the Court of Ordinary, containing the original order granting letters of administration to the plaintiff, is admissible without accounting for the non-production of the original letters. *McRory vs. Sellars, administrator*... .. 550
16. The statement of the overseer of defendant, who was in possession of the land, and managing his property for him as his agent, as to the reason why a fence was located in a peculiar manner, is admissible to prove the adverse possession of the defendant. *Shipp et al. vs. Wingfield, executor*..... 593
17. Where an insurance was effected under an open policy of insurance, issued to the company's agent, the insured taking a certificate that his insurance was according to the terms specified in said open policy, which was retained by the agent:
Held, That in a suit for a loss, it was not sufficient for the plaintiff to produce the certificate alone, since on its face it appeared that it did not contain the whole agreement. *Underwriters' Agency vs. Sutherlin*..... 652

EXECUTION.

1. In this State, a levy upon land is made by the entry of the sheriff upon the *fi. fa.*; there is no actual seizure, and there is no levy until the entry is made. *Isam et al. vs. Hooks*..... 309

EXECUTORS.

See *Administrators and Executors*.

EXPRESS COMPANY. See *Carriers*, 1.

FACTORS.

1. When cotton is delivered to a railroad agent, consigned to a factor by tenants, in their own names, this is not sufficient to charge the consignee with the landlord's portion, though he may have known it to have been one fourth. *Wilson & Company vs. Walker*..... 319

2. Where a wife, with consent of her husband, rents land on her own account, hires a man to cultivate it, and furnishes and feeds a horse, out of her separate estate, to be used in making the crop, the crop, when made, is not subject to a factor's lien given by her husband on *his* crop, made the same year, for provisions furnished, especially when the evidence shows that none of the provisions furnished were used by the wife in making her crop. *Dubose vs. McDonald*..... 471

FEEs. See *Attorney*, 5.

FORCIBLE ENTRY.

1. Upon the trial of a case, before a Justice of the Peace, for forcible entry, some force on the part of the defendant in entering must be shown. Where the entry is proved to be peaceable, the verdict should be for the defendant. *Curry vs. Hendry*..... 631

FRAUD. See *Limitation of Actions*, 6.

FRAUDS, STATUTE OF.

1. The building of a party-wall by the plaintiff, under a parol agreement with the defendant that he would pay for one-half of as much of the wall as he used, when he built, is such a part performance of the contract as takes it out of the statute of frauds. *Rawson vs. Bell*..... 19
2. Implied trusts are not within the statute of frauds, and the Courts will hear parol evidence, showing the facts from which they are sought to be implied. *Alexander, executrix, vs. Alexander et al.*..... 283

GARNISHMENT.

1. C. holds the notes of W., which are not yet due, secured by mortgage. Before they fall due, a judgment creditor of C.'s issues garnishment against W. and obtains judgment against the garnishee for the amount of C.'s debt to him (the creditor), which is less than the amount of the notes. After judgment against the garnishee, but before the notes fall due, they are set apart to C. as personalty, under the homestead laws. On the maturity of the notes, the judg-

- ment creditor issues execution against the garnishee (which was levied on his property), who voluntarily pays the amount to the attorney of the judgment creditor. Before the maturity of the notes, the garnishee had written notice that they had been set apart to the payee as personalty, under the homestead laws : *Held*, That C. was entitled to foreclose the mortgage for the full amount of the notes. If the money has not passed beyond the control of the Court, it should be ordered to be paid in satisfaction of the mortgage judgment in preference to the creditor's judgment against the garnishee. If it has, C. is entitled to have execution against the mortgaged property, the owner of which must look to those to whom he paid the money for remuneration. *Watkins vs. Cason*..... 444
2. The monthly wages of a clerk, subject to a *pro rata* deduction for time lost, cannot be garnished in the hands of his employer. *Butler, McCarty & Co. vs. Clark & Co*..... 466
3. A return of a sheriff upon a writ of attachment, which states that he served a named person "personally" with a summons of garnishment, may be amended so as to show that he served such person as president of a bank. If the summons of garnishment has been lost, and the sheriff is dead, the plaintiff, on motion to do so, should be permitted to prove by *aliunde* testimony that the summons of garnishment was directed to the person served as president of the bank. If the garnishee denies it, he can tender an issue, which, if found in favor of the plaintiff, will entitle him to an order amending the return, "so as to make the proceedings conform to the facts." *Mayer & Lowenstein vs. Chat. Nat. Bank*..... 606

GENERAL ASSEMBLY.

See *Western and Atlantic Railroad*, 2.

GUARDIAN AND WARD.

1. Implied trusts are not within the statute of frauds, and the Courts will hear parol evidence, showing the facts from which they are sought to be implied. *Alexander, executrix, vs. Alexander et al*..... 283
2. Where one holds the legal title to property, but the

same has been paid for by or with the funds of another, the law implies a trust. *Ibid.*

3. Where a guardian has purchased property with the funds of his wards, and has, by his written and sworn answer to a bill in equity, so declared, and that he holds it for their use, the wards may recover the property in a Court of law, notwithstanding it may appear that the guardian took the deed to himself, making no mention of his wards. *Ibid.*
4. Receipts in full by wards to their guardian, which, in express terms, discharge the guardian from all liability, may be explained by parol, and will only cover such matters as were intended to be covered thereby. *Ibid.*
5. A receipt in full by a ward to his guardian, discharging him from all claims the ward may have against him, in law or in equity, does not convey to the guardian any title to the land held by the guardian for him, even though the same be held under an implied trust, especially if, at the time of the receipt, the ward has reason to believe that the title to the land is to the guardian as guardian. *Ibid.*
6. Section 1794 of the Code, declaring that a natural guardian is not entitled to demand or receive the property of a minor, until he or she has given bond to the Ordinary, does not make such receipt illegal in such a sense, as that the person paying it cannot recover it back, or show that it has, in fact, been accounted for by the natural guardian to the ward, or applied to the benefit of the ward. *Southwestern Railroad Co. vs. Chapman, guardian, et al.*..... 557
7. Where a bill in equity was filed by a railroad company, alleging that it had paid the dividends on certain shares of stock belonging to a minor, to the mother of the minor, the father being dead; that the mother had appropriated the money paid to the necessary uses and expenses of the minor; that a guardian of the minor had been subsequently appointed who had brought suit against the railroad, and obtained a judgment for the dividends; that on the trial of the suit this defense of the company had been disallowed by the Court on the ground that it was not a good defense at law, since the mother was not a party to the suit; that final judgment had given a lien against

the company in favor of the guardian, who was about to proceed to collect the money by execution; that the mother was insolvent, and that no accounting had been had between the guardian and the mother, for the expenditures for which this money was used; and the bill prayed that the judgment at law might be enjoined, until an account should be taken, as to the amount due from the ward's estate to the mother, for said expenditures, and that the amount, when found, should be applied to the judgment:

Held, That the Judge ought to have granted the injunction. *Ibid*.

HARBOR. See *Criminal Law*, 10, 11.

HOMESTEAD.

1. When A sold land to B, taking his note for the purchase-money, secured by a mortgage on the land, which was duly recorded, and B sold a portion of the land to C, who paid a part of his purchase-money to B, and for the balance joined with B in a note to A, secured by a mortgage to A on the lands of both B and C, A giving up the old note and mortgage:

Held, That on the foreclosure of the mortgage, the *fi. fa.* may sell the land of C, notwithstanding C may have had the same set off as his homestead. Whether the purchase-money debt of C to B was satisfied by novation is not material. The note and mortgage given by C to A was for the removal of an encumbrance from the land, and brought the land within the exceptions to the homestead clause of the Constitution of 1868. *Hawks vs. Hawks et al.*..... 204

2. A widow, who has no children living with her, dependent on her for support, is not entitled to a homestead out of the property of her deceased husband, as the head of a family, according to the true intent and meaning of the Constitution of 1868. *Kidd, administrator, vs. Lester, administrator*..... 231

3. Where execution was levied upon land which had been set apart as a homestead, the plaintiff having made affidavit that the debt upon which the execution was founded was for the purchase-money, and the defendant filed a counter-affidavit to the effect "that, to the best of his knowledge and belief, he paid

- the purchase-money for the land levied on," a demurrer to said counter-affidavit was properly sustained. *McGhee vs. Way*..... 282
4. Where a homestead in land is set apart, the applicant is entitled to the crops growing on the same. *Cor, Marshall & Co. et al: vs. Cook*..... 301
5. C. holds the notes of W., which are not yet due, secured by mortgage. Before they fall due, a judgment creditor of C.'s issues garnishment against W. and obtains judgment against the garnishee for the amount of C's debt to him (the creditor), which is less than the amount of the notes. After judgment against the garnishee, but before the notes fall due, they are set apart to C. as personalty, under the homestead laws. On the maturity of the notes, the judgment creditor issues execution against the garnishee (which was levied on his property), who voluntarily pays the amount to the attorney of the judgment creditor. Before the maturity of the notes, the garnishee had written notice that they had been set apart to the payee as personalty, under the homestead laws :
Held, That C. was entitled to foreclose the mortgage for the full amount of the notes. If the money has not passed beyond the control of the Court, it should be ordered to be paid in satisfaction of the mortgage judgment in preference to the creditor's judgment against the garnishee. If it has, C. is entitled to have execution against the mortgaged property, the owner of which must look to those to whom he paid the money for remuneration. *Watkins vs. Cason*..... 444
6. If land be sold, and the purchaser indorse the note of a third person to the vendor in payment, and transfer a mortgage to him, securing said note, there is no such novation of the contract, no change in the relations of the parties to each other as to deprive the vendor of his right to enforce the payment of the purchase money by levy on the land, (which has been set apart by the purchaser as a homestead) under execution against the indorser and maker of the note. The land was the consideration given for the indorsement of the note and mortgage. Until they are paid the vendor's claim for the purchase money is superior to the homestead, and the land may be subjected to its payment. *Lane vs. Collier, administrator*..... 580



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When dower had been assigned to a widow in a tract of land, and she afterward applied and had the same set apart to her and the minor child of her deceased husband as a homestead, and an execution founded on a debt of the deceased husband and father was levied on the reversion, after the termination of the dower, and the widow, for herself and minor child, filed a claim :

Id., That under the facts, as stated, the property was properly found not subject. *Adams vs. Adams et al.* 630

Where an applicant for homestead seeks to have realty, alone, to the value of \$2,000 in specie, set apart, it is unnecessary to file a schedule of personalty. *Harkins vs. Arnold*..... 656

Where it appears that a widow, with minor children, whose father died in this State, married a second time, and she and her husband, after living in the county of her first husband's residence for some time, left the State, taking the minors with them, but frequently vowed, and still avow, their intention of returning to their former home, which they claim never to have abandoned, and application is made, in behalf of the minors, for homestead out of their father's estate, by next friend, in the county in which the father died resident, and objection is filed by a creditor of the father, on the ground that the minors are not citizens of Georgia, and, therefore, not entitled to a homestead, and the jury, on appeal from the Ordinary who granted the homestead, affirm his judgment :

Id., That the question of domicile was one of fact under the circumstances, and the jury having found in favor of the minors' right to homestead, this Court will not disturb the verdict which is warranted by the evidence. *Ibid.*

An infant who has no guardian, may apply, by next friend, for a homestead. *Ibid.*

HUSBAND AND WIFE.

Where property which came by the wife, and to which her marital rights of the husband have attached, is conveyed away by the wife, with the full knowledge and consent of the husband, he is estopped from claiming title to the land. *Anthony et al. vs. Stephens et al.* 241

2. In divorce cases, the husband is an incompetent witness to prove the adultery of his wife. *Cook vs. Cook.* 308
3. Where a wife, with consent of her husband, rents land on her own account, hires a man to cultivate it, and furnishes and feeds a horse, out of her separate estate, to be used in making the crop, the crop, when made, is not subject to a factor's lien given by her husband on his crop, made the same year, for provisions furnished, especially when the evidence shows that none of the provisions furnished were used by the wife in making her crop. *Dubose vs. McDonald.*..... 471
4. Where, in a marriage settlement, certain property was settled upon the wife for life, remainder to the husband for life, remainder to the heirs general of the husband :
Held, That the husband took a vested remainder in fee.
Varner vs. Boynton et al...... 503
5. Where the husband, with the consent of his wife, invested a portion of the estate so conveyed in real estate, taking from the vendor a bond for titles, his heirs-at-law have no right to follow the proceeds to the injury of the vendor, a portion of whose debt is still unpaid. *Ibid.*
6. Where the husband has diverted a portion of the income of the trust estate, and invested the same, without the consent of the wife, in real estate, and subsequently, with her consent, invested a portion of the *corpus* of the estate, in the same real estate, the heirs-at-law of the husband have no right in the remainder of the *corpus*, as against the right of the wife to be reimbursed for so much of the increase as was so diverted and invested. *Ibid.*
7. At the time of the commencement of this suit, the husband was the only person who could legally commence suit for land, the title to which was derived through the wife, consequently the statute of limitations ran during the coverture. *Shipp et al. vs. Wingfield, executor*..... 593
8. Upon the hearing of the motion to make an injunction permanent, it is not error in the Chancellor to receive the affidavit of the wife of one of the defendants, in relation to facts not coming to her knowledge

from confidential communications of her husband.
Davis vs. Weaver et al...... 626

ILLEGALITY.

. The mere allegation in an affidavit of illegality that the judgment is for an amount considerably greater than the verdict, without stating how large is the excess, is insufficient. *McGhee vs. Way*..... 282

INDICTMENT.

See *Criminal Law*, 13, 14, 16, 18, 24, 25, 26, 28.

INDORSEMENT.

. Under the provisions of the Revised Code, sections 2738, 2739 and 2123, accommodation indorsers of a negotiable security, payable at a chartered bank, are considered as securities merely, and if one pays off the debt he can compel the others to contribute. *Freeman vs. Cherry*..... 14

. If land be sold, and the purchaser indorse the note of a third person to the vendor in payment, and transfer a mortgage to him, securing said note, there is no such novation of the contract, no change in the relations of the parties to each other, as to deprive the vendor of his right to enforce the payment of the purchase money by levy on the land, (which has been set apart by the purchaser as a homestead,) under execution against the indorser and maker of the note. The land was the consideration given for the indorsement of the note and mortgage. Until they are paid, the vendor's claim for the purchase money is superior to the homestead, and the land may be subjected to its payment. *Lane vs. Collier, administrator*..... 580

INFANT. See *Homestead*, 10.

INJUNCTION.

. Where it appeared that the debt for which the execution was issued was contracted prior to June 1st, 1865, that it was for the unpaid purchase money due for the land levied on, that the complainant was, at the time of the commencement of the action on which the judgment and execution were founded, in possession of the

- land, and is still in possession, it was proper in the Chancellor to refuse an injunction against the sale of the property under said execution, applied for on the ground that the taxes on the debt had not been paid. *Hambrick vs. Dickey et al.*..... 236
2. The discretion of the Chancellor in refusing an injunction will not be interfered with, unless abused. *Anthony et al. vs. Stephens.*..... 241
3. This Court will be slow to control the discretion of the Judge of the Superior Court in his grant of a temporary injunction, especially if the bill contain charges of fraud. *Isam et al. vs. Hooks.*..... 309
4. On the abolition of the officers of the Western and Atlantic Railroad, the Comptroller General became the proper custodian of the books and records of the road, and the duty of causing the true amount due by defaulting officers of the road to be ascertained devolved upon him. *Scofield et al. vs. Perkerson et al.* 325
Hinton et al. vs. Same...... 325
5. The Legislature has authority to appoint, by resolution, a committee of their own body, as ministerial agents, to audit and state the accounts of the officers and agents of the Western and Atlantic Railroad. Where such statement shows an officer or agent in default, and is transmitted by the committee to the Comptroller General, and he thereupon issues executions against the defaulting officer and his sureties, this Court will presume that he satisfied himself of the correctness of the committee's report by inspection of the books and accounts of the Western and Atlantic Railroad, and adopted it as his own. *Ibid.*
6. The Courts will not entertain jurisdiction to enjoin such execution on the ground that there is a suit pending, at the instance of the State, against the defaulting agent and their securities on their bond, or on the ground that the amount for which the agent is a defaulter, was fraudulently used and embezzled by him. *Ibid.*
7. An injunction will not be granted to restrain the enforcement of a judgment when it appears by the bill that the Court in which the judgment was obtained had no jurisdiction. The remedy at law is complete either by affidavit of illegality, or by action of trespass. *Hart, Receiver, vs. Loxaron.*.....

8. While it is true, as a general rule, that no judicial interference can be had in any levy or distress for taxes, yet where it happens that the tax collector placed a tax *fi. fa.* in the hands of the sheriff, with instructions to collect the same out of the first money that should come into his hands from the sale of the defendant's property under an execution held by him, and the sheriff did sell property of the defendant for more than enough to pay off the tax *fi. fa.*, under other executions, and application was made to the tax collector for his consent to have this money paid over to such executions, which he refused, and the sheriff thereupon took the responsibility of paying over the money to the levying executions and then of his own motion levied the tax *fi. fa.* upon other property of the defendant without instructions to do so from the tax collector, the sheriff will be enjoined from proceeding under the tax *fi. fa.* at the instance of a creditor of the defendant, who has attached the property last levied on, who states in his bill that the defendant is insolvent, and that if complainant is deprived of this means of securing this debt by the action of the sheriff, he will lose it, it being apparent that the sheriff levied the tax *fi. fa.* for his own protection and not for the benefit of the State. *Beatie vs. Brown et al.*..... 458
9. Where property is levied on which is claimed by complainant to have been released from the lien of execution by a written contract, and the terms of said agreement are ambiguous, and the affidavits as to the intention of the parties read on the hearing of the motion for injunction, are conflicting, this Court will not interfere with the discretion of the Chancellor granting an injunction. *Kendall et al. vs. Dow*..... 607
10. Equity will interfere by injunction where it will prevent a multiplicity of suits and quiet the title to a number of lots of land by one final decree. *Ibid.*
11. Where a bill was filed setting up that the complainant had conveyed by deed to a railroad company for laying and using its track, one hundred feet width of the land through his plantation, and trusting to the assurances of the president of the road, that proper stock-gaps should be erected, as they might be needed, had neglected to put in the deed any stipulation as to the gaps, and the bill prayed that the company might

be enjoined from running the cars and using the land until the "gaps" were erected:

Held, That the injunction was properly refused by the Judge, even though there might be equity in the bill.
Cook vs. North & South Railroad Company..... 61

12. The law places the granting or refusal of injunctions in the sound discretion of the Judges of the Superior Courts; unless that discretion has been manifestly abused, this Court will not control its exercise. We see no abuse of the discretion in the present case, in which the injunction has been partially granted, as asked for. Certainly none of which plaintiff can complain. *Davis vs. Weaver et al.*..... 62

13. Upon the hearing of the motion to make an injunction permanent, it is not error in the Chancellor to receive the affidavit of the wife of one of the defendants, in relation to facts not coming to her knowledge from confidential communications of her husband. *Ibid.*

INSURANCE.

1. Where an insurance was effected under an open policy of insurance, issued to the company's agent, the insured taking a certificate that his insurance was according to the term specified in said open policy, which was retained by the agent:
Held, That in a suit for a loss, it was not sufficient for the plaintiff to produce the certificate alone, since on its face it appeared that it did not contain the whole agreement. *Underwriters' Agency vs. Sutherlin*..... 65

INTERROGATORIES.

1. Where interrogatories were returned to a former Clerk in vacation and had the following entry on them:

"Received of M. W. Stamper the within package, who says that he received them from one of the commissioners, and that they have been unopened and unaltered.

"Sworn to and subscribed before me this 18th March, 1871. W. H. DuBOSE, Clerk."

Which affidavit was not signed, and it was shown that the present and former Clerks, some time after the term of the Court, found the package in an iron box on the floor, in the corner of the Clerk's office,

- that it had remained in the possession of the present Clerk, unopened and unaltered, ever since, the depositions were inadmissible. *Christian vs. Ransome*..... 138
2. Where a set of interrogatories was tendered in evidence, and it appeared, from inspection, that the commissioners had taken the answers of the witness as required, that he had sworn to and subscribed to them, that the commissioners had duly attached their names to a proper certificate; that, after this, the commissioners had permitted the witness to add to his answers, adding a new *jurat* and a new certificate, but it did not affirmatively appear that the addition was at the same time and place, and a part of the same transaction:
- Held*, That the addition was not properly a portion of the return. *Western and Atlantic Railroad vs. Harris*..... 602

INTRUDERS—PROCEEDINGS AGAINST.

1. When in a proceeding against one as an intruder, the defendant's affidavit taken before the sheriff, was that she "claims the *bona fide* legal right to the possession" of the premises:
- Held*, That this was a compliance with section 4000 of the Revised Code. The fact that the word "the" is placed before the words "*bona fide*" being an evident clerical mistake, the real meaning being that she "claims, *bona fide*, the legal right to the possession." *Paige vs. Dodson*..... 223
2. The counter-affidavit to proceedings to eject an intruder cannot be amended, nor can a second be made. *Ibid*.
3. An intruder's warrant does not lie against one who, in good faith, claims the right to the possession of the premises he is sought to be ejected from, and if the defendant in such a warrant makes the counter-affidavit required by the Code, and it appear on the trial that he does, in good faith, claim the right to the possession, the jury ought to find for the defendant. *Nichols vs. Chandler et al*..... 479

JUDGMENT.

1. A judgment based upon a note for the hire of a ne-

- gro, being the oldest, is entitled to a fund in Court for distribution. *Tidwell vs. Hewell et al.*..... 222
2. Where land is "regularly advertised and sold at administrator's sale," (and the record states no more) and is afterwards levied on under a judgment obtained against the intestate in his life time, and the Court decides that the administrator's sale divests the judgment lien—to which judgment exception is taken—the plaintiff in error must show affirmatively that the estate was solvent, and the order of sale was not granted for the payment of debts, but for distribution only, in order to entitle him to a reversal of the judgment, even if this would do so. And as to this, we reserve our opinion. *Carhart et al. vs. Vann*..... 389
3. An injunction will not be granted to restrain the enforcement of a judgment when it appears by the bill that the Court in which the judgment was obtained had no jurisdiction. The remedy at law is complete either by affidavit of illegality, or by action of trespass. *Hart, receiver, vs. Lazaron*..... 396
4. A judgment rendered by the Judge of the Superior Court, without the verdict of a jury, in a civil case founded on contract, when an issuable defense is filed on oath, should be set aside. *Erambert vs. Scarborough* 398
5. When there has not been personal service on the defendant in a suit on an open account, the plaintiff must prove his claim to the satisfaction of the Court by competent testimony before he is entitled to a judgment, although no issuable defense has been filed on oath. *Jones vs. Adams*. 605

JUDICIAL INTERFERENCE. See *Taxes*, 6.

JURISDICTION.

1. An injunction will not be granted to restrain the enforcement of a judgment when it appears by the bill that the Court in which the judgment was obtained had no jurisdiction. The remedy at law is complete, either by affidavit of illegality or by action of trespass. *Hart, receiver, vs. Lazaron* 396
2. Where a suit was brought to the City Court of Augusta for \$235 96, the jurisdiction of which does not

extend to amounts under \$100, and the matters in dispute were referred to an arbitrator, and upon the return of the award, which was in favor of the plaintiff, for \$68 14, besides interest, a motion was made to dismiss the case for want of jurisdiction, as the plaintiff, by his own admission, only claimed \$81 96, it was proper in the Court to sustain the motion. *Clements vs. Painter*..... 486

The records of the Court of Ordinary are amendable so as to make them speak the truth, upon the proper steps being taken for that purpose. The fact that the Court had no jurisdiction to grant the order, which it is proposed to amend, cannot affect the motion to amend. If the jurisdiction did not exist, parties whose interests may be affected by the judgment can take advantage of the want of jurisdiction as well after as before the amendment, whenever and wherever it interferes with their rights. *Thompson et al. vs. Kimbrel et al.*..... 529

Upon a motion to amend the records of the Court of Ordinary, the only issue before the Court is whether the amendment proposed will make the record speak the truth. Whether the original order was legally passed or not is irrelevant and impertinent to the issue. Nor can such order, if illegal, be set aside in this proceeding. The case is not altered where the motion is to rescind an order allowing the amendment. *Ibid.*

Where an executor is sued as such, in the county of his residence, and, pending the suit, dies, and administration *de bonis non* is granted upon the estate of his testator, who lived and died in a different county, to a citizen of the county of the testator's residence, the suit against the executor does not abate, and a *scire facias* issued to make the administrator *de bonis non* a party to the suit, should not have been dismissed under the facts stated. *Walton vs. Gill, administrator; Leonard et al. vs. Same; Weeks, executor, vs. Same*... 600

JURY.

Persons residing within the corporate limits are incompetent jurors to try a suit against the city. *Johnson vs. Mayor and City Council of Americus*..... 80

2. It is not error in the Court to refuse to strike from a panel of twenty-four jurors a juror somewhat deaf, at the instance of defendant, who himself struck the juror in selecting a jury, and from which refusal no damage is shown to have resulted to the defendant. *Anderson vs. Green, executor*..... 361
3. That there was a substitute for the juror selected by the parties, who answered to the name of his principal, is no ground for new trial, it not appearing that both substitute and principal were unknown to defendant and his own counsel. *Ibid.*
4. That the name of one of the persons who tried the case is not upon the jury list of the county, as made up in conformity to the Act of the General Assembly of February 15th, 1865, is an objection *propter defectum*, and comes too late after verdict, though the party objecting did not know the fact until after the trial. 40 Ga., 253. *Ibid.*
5. Jurors cannot be heard to impeach their verdict. *Ibid.*

JUSTICE COURT.

1. A *certiorari* does not lie to correct the errors of a Justice of the Peace, in a judgment involving questions of fact, when the amount of the judgment is over fifty dollars. In such cases the remedy is by appeal, as provided by the Constitution of 1868. *Wilkowski vs. Skalowski*..... 41

LAND. See *Bond for Titles*, 1, 2, 3, 4.

LANDLORD AND TENANT.

1. The holder of a rent note, who is not the landlord, cannot sue out a distress warrant for rent not due. But when, in such a case, the affidavit made for the distress warrant, describes the sum sued for as the rent for a plantation owned by a third person, and the rent note is payable to such third person or bearer, it does not necessarily follow that the affiant is not the landlord. If such was the fact, it should be proved upon an issue raised by counter-affidavit before the jury, and the Court asked to charge the law applicable to the case. *Scott, trustee, vs. Berry*..... 394

2. A married woman may sue out a distress warrant for rent of her separate estate without joining her husband or next friend. *Urquhart vs. Urquhart*..... 415
3. If an affidavit is made for a distress warrant, for rent due in specifics, which does not aver the value of the specifics, but upon the trial of the issue formed by the counter-affidavit of defendant before a Justice of the Peace, the value is proved and substantial justice has been done, a *certiorari* should not be granted for want of averment of the value of the specifics, or for allowing such value to be proved in the absence of any averment of value. *Ibid.*
4. Upon an issue formed to try whether any rent is due on a distress warrant, questions asked a witness, as to whether defendant ever owned the land, and as to how he came in possession of it, may have been properly ruled out. If the object was to show that the defendant owned the land during the time for which the rent is alleged to be due, the record should go further, and show affirmatively that evidence tending to prove that fact was ruled out. *Ibid.*
5. Where an execution was levied upon a lot of cotton which was sold and the money arising from the sale was claimed under a distress warrant for rent of the land, on which the cotton was made, and the Court adjudged the warrant irregular but refused to pass any order disposing of the money until the landlord could procure a new distress warrant, which he did before the adjournment of the Court, and the money was awarded to him :
Held, That this was not error. *Harrison vs. Guill et al.* 427
6. One who rents land and sub-lets it to a third person stands in the relation of landlord to the sub-tenant and may have a distress warrant for his rent. *Ibid.*
7. An owner of land, who contracts with a cropper that he shall furnish to the cropper certain supplies with which to make the crop, and that the share of the cropper should not be moved from the place until such advances are paid for, has a right to retain the crop until said advances are paid, against the cropper and all purchasers from him, or mortgagees, subsequent to the date of the contract. *Applying vs. Odom et al.*..... 583

LEAVE OF ABSENCE. See *Attorney*, 4, 6.

LEGACY. See *Will*, 4, 5, 9.

LEVY. See *Execution*, 1.

LIEN.

1. The laborer or mechanic who does the work and furnishes the materials, is the person entitled to a lien upon the property of his employer under the provisions of the Act of 1869. *Breed vs. Nagle*..... 112
2. The laborer or mechanic is not entitled to a lien on any greater interest in the property than his employer had at the time the work was done or the materials furnished. *Ibid.*
3. Where the affidavit to foreclose a lien on a steam saw mill, under the Act of 1868, alleges that deponent was employed by Wall, the owner or lessee of a steam saw mill situated in the county of DeKalb, as a laborer in and about said mill, for which services there is due deponent \$51 50; that he has demanded payment of said Wall, and he has failed and refused to pay the same; that this prosecution is within one year from the time the debt became due, as will more fully appear by reference to the bill of particulars hereto annexed; that deponent claims a lien upon said mill for the amount so due him as aforesaid, it is in substance a compliance with the provisions of the Act under which plaintiff was proceeding. *Wright vs. Phillips*..... 197
4. Where the bill of particulars attached to the affidavit consisted of a due bill for the amount claimed, made by Wall, it was competent for plaintiff to show that it was given for the services specified in the affidavit, that Wall was in possession of the mill at the time of the foreclosure of the lien, and of the levy of the execution thereon. *Ibid.*
5. When A loaned money to B, to be used by B in rebuilding a certain mill of B's, which had been destroyed and was being rebuilt, and it was understood that A was to have a lien on the mill to secure him, but no writing or other written memorandum was made, except the giving of notes for the money, and

- there was no charge of accident, fraud or mistake by which the execution of such a writing was prevented: *Held*, That after B's death, on a bill to marshal his assets, equity will not set up in favor of A a lien on the mill, to the prejudice of the other creditors of B. *Printup vs. Barrett, administrator* 407
6. Where a wife, with consent of her husband, rents land on her own account, hires a man to cultivate it, and furnishes and feeds a horse out of her separate estate, to be used in making the crop, the crop, when made, is not subject to a factor's lien given by her husband on *his* crop, made the same year, for provisions furnished, especially when the evidence shows that none of the provisions furnished were used by the wife in making her crop. *Dubose vs. McDonald*..... 471
7. An owner of land, who contracts with a cropper that he shall furnish to the cropper certain supplies with which to make the crop, and that the share of the cropper should not be moved from the place until such advances are paid for, has a right to retain the crop until said advances are paid, against the cropper and all purchasers from him, or mortgagees, subsequent to the date of the contract. *Appling vs. Odom et al.*..... 583
8. An affidavit by an officer or employee on any steamboat, made under section 1969 of the Code, for the purpose of foreclosing a lien on such boat for any debt that the affiant may have against the owner or lessee of the boat, must state the name of the person or persons owing the debt, as well as comply with the other requirements of the statute. This is necessary to give the State authorities, who cannot proceed solely *in rem* in such a case, jurisdiction. And where the averment is, that demand was made upon the agent, it should state that the demand was made on the agent of the owner or lessee, as the case may be, and not on the agent of the boat. *Cape Fear Steamboat Company vs. Torrent et al.*..... 585
9. The affidavit being the foundation of the proceeding, the execution issued thereon must conform to it, and cannot supply its defects. Where the affidavit contains all the requirements of the law, the execution, if defective, may be amended so as to make it conform to the affidavit. *Ibid.*

10. A *bona fide* purchaser of the absolute title to personal property, without notice of any unencumbered statutory lien upon it, takes the same divested of any such lien. Our statutory lien laws *secure priority of judgment* to favored classes of debts *out of certain property of the person who incurred the debts*. When such property passes into the hands of a *bona fide* purchaser without notice and before foreclosure, it is no longer the property of the person incurring the debt, and not having gone into the possession of one affected with notice, the lien is lost. *Frazer vs. Jackson*..... 621

LIMITATION OF ACTIONS.

1. Where a tenant in common conveys the whole lot to a third person, and the grantee took possession, claiming the entire lot as his own, this action constitutes a disseizin and ouster of the other tenants in common, and they are barred from asserting their right to such property after the expiration of seven years. *Horne et al. vs. Howell*..... 9
2. The statute of limitations was suspended from December, 1860, to the first of December, 1861, and again from November 8th, 1865, to July, 1868, and an account which became due in August, 1861, and was sued on July 13th, 1869, was not barred. *Satterfield vs. Shwab & Company*..... 119
3. Where, in a declaration in ejectment, the ouster is alleged as occurring since the 1st of June, 1865, but the proof shows the defendant to have been in possession before the 1st of June, 1865, the action is not barred by the Act of March 16th, 1869, because not brought within three months after the 16th March, 1869. *Lopez vs. Downing, administrator, et al.*..... 120
4. No damages or *mesne* profits can be recovered behind the 1st of June, 1865, but the defendant, if he defends by his possession under color alone, must show that possession to have been continued seven years before bringing the suit. *Ibid.*
5. Where suits were commenced on promissory notes and judgments rendered in favor of the plaintiff, which were set aside by the Supreme Court, upon the ground that said suits were void, and within six months from

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- this judgment said notes were again sued, these facts will not prevent the statutory bar from attaching. *Williamson vs. Wardlaw* 126
6. A legatee is not barred from asserting his claim to a legacy against the executor where suit is brought within ten years after the legatee arrives of age. *Anderson vs. Green, executor* 361
7. Where a bill is filed by the heirs of a deceased person for an account, and to recover possession of land from which their ancestor was ousted by fraud on the part of some of the defendants, and notice of the fraud by the others, before they acquired possession, and alleges facts which, if true, sustain the charge of fraud, and further alleges that, although the defendants have been in possession, under color of title, for more than seven years, yet that such possession originated in the fraud charged, and that such fraud deterred their ancestor, who was an illiterate man, from his action during his life, and that he died in 1868 in ignorance of the fraud, it is not demurrable for want of equity, nor on the ground that it shows on its face that the defendants have a complete prescriptive title to the land. *West et al. vs. Rodahan et al.*..... 553
8. At the time of the commencement of this suit, the husband was the only person who could legally commence suit for land, the title to which was derived through the wife, consequently the statute of limitations ran during the coverture. *Shipp et al. vs. Wingfield, executor*..... 593

LOAN AND BUILDING ASSOCIATION.

1. Where a suit to recover usury paid was brought against a Loan and Building Association, chartered by the Superior Court in favor of one who had been a member and borrower, and who, failing to comply with the rules, as to the payment of his monthly dues, had, by way of settlement, conveyed to the company certain real estate at an agreed price in full discharge of his obligations, and it appeared in proof that the company consisted of two thousand shares; that \$1 00 per month was to be paid upon each share until the accumulations should make each share worth \$200 00; that the monthly receipts were to be used in advancing to the shareholders on their ultimate interest at

such rates of premium as the money might bring at auction, and that each shareholder, taking an advance, was to pay \$1 00 extra upon each share advanced upon, giving a real estate mortgage to secure the performance by him of his agreement to pay his dues as the constitution of the company required :

Held, That the contract of a member taking an advance according to the rules, was not usurious *upon its face*, whatever might be the premium at which he agreed to take the advance. *Parker vs. Fulton Loan and Building Association*..... 166

2. Whether such a contract, though *legal* upon its face, was, in fact, illegal, would depend upon the object of the association. If it were, in truth, a mere devise to evade the usury laws, then it would be illegal, if in fact more was taken for the use of money than seven per cent. per annum. But if the organization were in fact and *bona fide* a plan with the real intent and object of "accumulating a fund by monthly subscriptions or savings of the members thereof, to assist them in procuring for themselves such real estate as they may deem proper," then it would not be illegal; and this being a question of fact, depending upon evidence, it was proper for the Judge to leave it to the finding of the jury. *Ibid*.
3. When no other facts appear to the jury, by the proof, going to show the object of such an association than the constitution, and the contract made in accordance therewith, a verdict of the jury that the contract is not illegal, is not only supported by, but is required by the evidence. *Ibid*

LOST PAPERS.

1. Where proceedings are instituted to establish a lost note, and suit is commenced after the rule *nisi* has issued, as allowed by section 3910 of the Code, and, pending the cause, the original note is found, it is not error to allow plaintiff to amend his declaration, so as to sue upon the original note thus found, even though there may be some immaterial discrepancies between the original note and the copy which it was sought to establish. *Cheney et al. vs. Dallan, administratrix, for use, etc*..... 401

MANUMISSION.

1. An executor who, by the will of his testator (probated in 1853, and by which a solvent estate of more than \$200,000 is committed to his hands), is directed to move a slave to a free State, to be there manumitted, and to invest for such manumitted slave, on his arrival at age, which occurs in 1862, \$3,000, cannot, after refusing to execute the bequest of his testator until the close of the war, free himself from liability by showing that the estate has perished on his hands from the results of war and other causes. *Anderson vs. Green, executor*..... 361
2. A provision in a will probated in 1853, directing a slave to be sent to a free State and there manumitted and provided for, was not in violation of the law of Georgia at that time. *Ibid.*
3. Where a will, executed in July, 1850, the testator dying in 1859, conveys property in trust, the proceeds to be applied to the benefit of certain slaves, and provides that the survivor shall receive the whole benefit, the clause is inconsistent with the provisions of the fourth section of the Act of 1818, against manumission, and therefore void. *Bennett et al. vs. Williams, administrator* 399

MALPRACTICE. See *Criminal Law*, 12.

MASTER AND SERVANT.

1. Where the plaintiff employed a servant who was indebted to one of the defendants in the sum of \$24, in satisfaction of which he had previously contracted to split rails, and defendants removed said laborer and his wife from the control of plaintiff, defendants were not liable for damages to plaintiff until the expiration of a reasonable time for the performance of the contract as to the rails. *Wharton et al. vs. Jossey*..... 578
- See *Railroads*, 2, 3.

MECHANIC'S LIEN. See *Lien*, 1, 2.

MESNE PROFITS. See *Ejectment*, 4.

MISNOMER. See *Criminal Law*, 18, 19.

MISTAKE. See *Estoppel*, 9.

MORTGAGE.

1. A mortgage upon real estate given to secure "advances" to be made by the mortgagee to the mortgagor, for the purpose of carrying on the farm of the mortgagor for 1870, is not invalid for want of a sufficient description of the debt intended to be secured. *Allen et al. vs. Lathrop & Company*..... 133
2. A mortgagor is estopped from denying his own title to the property mortgaged, and third parties claiming title to the land cannot at law make themselves parties to the proceedings to foreclose for the purpose of asserting their rights. The judgment is between the parties to the mortgage, and binds them, and them only. *Ibid.*
3. Where a deed is executed, and a bond taken by the grantor from the grantee, conditioned to reconvey on the repayment of money borrowed, with the interest due thereon at the time stipulated, the two instruments constitute a mortgage, and according to the well established principles of equity, the grantor is entitled to redeem the land on the payment of what may be due. *Clark et al. vs. Lyon et al.*..... 202
4. A paper containing all the requisites of a mortgage of personal property, is a mortgage from the date of its execution, even though it be not attested by an officer. *Nichols vs. Hampton*..... 253
5. It is sufficient if it be proven by the subscribing witness and recorded within three months from its execution. *Ibid.*
6. A paper, providing for a lien on a "bay mare," and showing that the mare was purchased by the mortgagor from the mortgagee, is a sufficient description of the property mortgaged. *Ibid.*
7. A mortgage recorded within three months from the date of its execution is a lien from its date, even against *bona fide* purchasers without notice. *Ibid.*
8. An affidavit, probating a mortgage, taken before the attorney of the mortgagee, who is a Notary Public, is not a legal affidavit, and a mortgage recorded on such probate is not legally recorded. *Ibid.*

9. C. holds the notes of W., which are not yet due, secured by mortgage. Before they fall due, a judgment creditor of C.'s issues garnishment against W. and obtains judgment against the garnishee for the amount of C.'s debt to him (the creditor), which is less than the amount of the notes. After judgment against the garnishee, but before the notes fall due, they are set apart to C. as personalty, under the homestead laws. On the maturity of the notes, the judgment creditor issues execution against the garnishee (which was levied on his property), who voluntarily pays the amount to the attorney of the judgment creditor. Before the maturity of the notes, the garnishee had written notice that they had been set apart to the payee as personalty, under the homestead laws: *Held*, That C. was entitled to foreclose the mortgage for the full amount of the notes. If the money has not passed beyond the control of the Court, it should be ordered to be paid in satisfaction of the mortgage judgment in preference to the creditor's judgment against the garnishee. If it has, C. is entitled to have execution against the mortgaged property, the owner of which must look to those to whom he paid the money for remuneration. *Watkins vs. Cason*..... 444
10. When a mortgage of realty in Georgia, is executed in New York before a Commissioner of Deeds only, without any other witness, a Court of Chancery has jurisdiction to reform and foreclose the mortgage. *McCrary & Co. vs. Austell, Inman & Co.*..... 450
11. Where a rule *nisi* to foreclose a mortgage, alleged that the mortgage was executed by a partnership to a parcel of land, and that the proceedings were against one as surviving partner, the other being dead, and the surviving partner filed a plea, setting forth that the land included in the mortgage was not partnership property, though owned by the partners as tenants in common, and the plea was demurred to and the demurrer sustained: *Held*, That as there was no denial that the mortgage to the property was made by the partners, as such, and as, if this were so, it would estop the parties from denying title in the partnership, the plea was properly overruled. *Roberts vs. Administrators of Oliver.* 547

MULTIPLICITY OF SUITS. See *Equity*, 19.

MUNICIPAL CORPORATIONS.

1. The Act of incorporation of the city of Americus, and the ordinance passed in pursuance thereof, authorizing the arrest and detention of violators of the ordinances of said city, without warrant, are not unconstitutional. *Johnson vs. The Mayor and City Council of Americus et al.*..... 80
2. In case of an arrest without warrant, the prisoner should, without unreasonable delay, be conveyed before the most convenient officer authorized to receive an affidavit and to issue a warrant, and the imprisonment of the offender beyond a reasonable time for that purpose would be illegal. *Ibid.*
3. Persons residing within the corporate limits are incompetent jurors to try a suit against the city. *Ibid.*

NEGRO HIRE. See *Judgment*, 1.

NEW TRIAL.

1. In this case we think the verdict of the jury is fully supported by the evidence, and there being no material error in the charge of the Court, there was no error in refusing a new trial. *Greene et al. vs. Lowry.* 55
2. Where a different verdict could not have been rendered, a new trial will not be ordered though an immaterial error may have been committed. *Johnson vs. Mayor and City Council of Americus*..... 80
3. An immaterial error is no ground of new trial. *Breed vs. Nagle*..... 112
Cook vs. Cook..... 308
4. On a motion for a new trial, on the ground of newly discovered evidence, the evidence is not cumulative if it refers to a material issue not made at the trial, either by the pleadings or the evidence. *Hughes vs. Coursey.* 115
5. When a case was dismissed in this Court for want of prosecution, and it appeared in a bill, filed in the Court below for a new trial, that the plaintiff's counsel had been misled by a statement of the defendant's counsel, to the effect that, under the rules of this Court, the case would be put at the heel of the whole docket, on agreement of counsel, and at the request of said defendant's counsel, and solely for his convenience he

had so agreed, and had, in consequence, not appeared at the calling of the case, all of which was admitted by said defendant's counsel, who assumed the whole blame of the non-appearance, and admitted that the plaintiff was in no *laches*:

Held, That, as the motion for a new trial was meritorious, and the fault of its miscarriage was with the defendant in error, by his own admission, the Court should have sanctioned the bill. *Ibid*.

6. On the trial of an indictment for murder, where there is a general plea of not guilty, it is not error as against the prisoner for the Judge to charge the jury as to the law of justifiable homicide, even though, from the evidence, it is plain that the prisoner is, in any event, guilty of manslaughter. An error of the Court in his charge to the jury, which could not, in any view of it, have injured the prisoner, under the evidence, is no ground for a new trial. *Tate vs. The State*..... 148
7. Newly discovered evidence of a custom, in violation of the public laws of the State, is no ground of new trial. *Lynes vs. The State* 208
8. Where the evidence which was objected to, if excluded could not have altered the result, it was error in the Superior Court to set aside the judgment of the magistrates. *Wilcox, Gibbs & Company vs. Turner*... 218
9. When there is considerable conflict in the testimony, and the Judge below refuses a new trial, this Court will not disturb the judgment. *Minor vs. Glenn, Wright & Carr*..... 221
10. This Court will only interfere with the verdict of a jury when there is not sufficient evidence under the law to authorize the verdict, assuming everything to be true as proved. *Porter et al., executors, vs. Kolb, guardian*..... 266
11. In this case, the verdict is sustained by the evidence, and, under the rule so often announced, the judgment of the Court below ought to be affirmed. *Wardlaw vs. McConnell, executrix*..... 273
12. The verdict in this case is not supported by any legal evidence. *Smith vs. The State* 298
13. When a motion is made for a new trial, on several grounds, and the Court grants the new trial on one of

- the grounds overruling the other grounds, and a bill of exceptions is filed to the judgment, this Court will inquire if the judgment be right in granting the new trial, and if that be right on any of the grounds taken in the motion, this Court will affirm the judgment, notwithstanding the Court below may have erred in the ground on which it placed the judgment. *Everett vs. Southern Express Company*..... 303
14. It is error in the Court to charge upon a point not in evidence. *Cook vs. Cook*..... 308
15. The jury having returned a verdict in favor of the defendant on his plea of set-off, and there not being sufficient evidence to create a *prima facie* liability of the plaintiffs on the same, a new trial will be granted. *Wilson & Company vs. Walker*..... 319
16. A motion for a new trial, on the ground that the indictment is fatally defective, though not strictly proper, will be sustained under the practice in this State. *Wood vs. The State*..... 322
17. Where the verdict is in no view for more than the complainant is entitled to recover, an immaterial charge as to one item claimed in the bill is no ground for a new trial, even conceding such charge to be erroneous. *Anderson vs. Green, executor*..... 361
18. The evidence offered by plaintiff sustains the judgment, and the mere inversion of the order of admitting the proof will not warrant the issuing of the writ of *certiorari*. *Urquhart vs. Urquhart*..... 415
19. Where a defendant seeks a new trial, on account of his having been providentially prevented from being present in Court when the judgment was rendered, and thus deprived of the benefit of his testimony, it is necessary that he should show affirmatively, the facts he could have proven, so that the Court can judge of the materiality of the same. *Cheney et al. vs. Walton*..... 432
20. The motion for a new trial in this case was properly overruled, the verdict not being decidedly and strongly against the weight of evidence, and the discretion of the Court as to the continuance, not having been, in our opinion, abused. *Cohen vs. Weigle*..... 438
21. Newly discovered evidence which, with ordinary diligence, might have been produced on the trial, of

- merely a negative character, and which would not even probably have changed the result, is not a good ground of new trial. *Arnold vs. The State*..... 455
22. The verdict of the jury was not contrary to the law and the evidence, but strictly in accordance therewith. *Ibid.*
23. Where a plea has been filed to the plaintiffs' action setting up a legal defense thereto, and a trial was had in the absence of one of defendants' counsel, who was alone acquainted with all the facts of the defense, which resulted in a verdict for the plaintiffs; on its being made to appear that said counsel had leave of absence, a new trial should have been granted. *Rust, Johnston & Co. vs. Ketchum & Hartridge*..... 534
24. A judgment will not be set aside for absence of defendant's counsel by leave of Court, and an announcement by the Court that none of the counsel's cases will be tried, except by consent, where it does not distinctly appear that such counsel was regularly retained in the case, he himself not being able to swear to it, and it does appear that the partner of the counsel, who was such at the time of the alleged retainer, is in Court and states that he knows of no defense, and it further appears that there is no counsel of record, that no plea is filed, and that there is a judgment by default which has not been opened. *Farmer vs. Perry*..... 543
25. Newly discovered evidence tending to prove a fact material to the issue, and about which the defendant had offered no testimony on the trial, and he is chargeable with no want of diligence, entitles him to a new trial. *Carter vs. The State*..... 637
26. The verdict in this case is fully sustained by the evidence, and this Court will, in its judgment, award damages against the plaintiff in error, on the ground that the case was brought up for delay only. *Mercier vs. Mercier*..... 643
27. There being evidence in this case of the existence of the mistake, and the jury having so found, we will not disturb the verdict. *Herty vs. Clark*..... 649

NOTICE.

1. The recital in an administrator's deed, executed on the 3d day of December, 1861, that leave to sell the land was granted in November last past, is notice to the purchaser that the requirement of the law, as to forty days' public notice of the sale, had not been complied with. *Groover et al. vs. King*..... 101
2. No notice to the consignee, where the goods arrive on time, is necessary to reduce the liability of the company from that of common carriers to that of warehousemen. *Southwestern Railroad Company vs. Felder*..... 433
3. If the goods arrive out of time, and after they have been demanded by the consignee, it might require notice of their arrival to the consignee, and a reasonable time after, to relieve the company from the extraordinary liability imposed by law upon a common carrier. *Ibid.*
4. Notice given to one deputy sheriff by the tax collector, under the circumstances set forth, to satisfy the tax *fi. fa.* with the money first made, is notice to all. *Beatie vs. Brown et al.*..... 459
5. The written notice required by section 3987 of the Code, to be given by the plaintiff in *certiorari* to the opposite party in interest, need not appear of record, if there is a waiver in writing of the notice. *New vs. LeHardy*..... 616

NOVATION.

See *Indorsement*, 2.

“ *Principal and Security*, 6.

OFFICER. See *Sheriff*, 2, 4.

OPINION ON EVIDENCE.

1. It is not an expression of opinion by the Judge, as to what has been proven on the trial of an indictment for keeping a lewd house, to say to the defendant's attorney, (who is addressing the Court upon the law of the case,) in reply to the claim of the attorney, that there must be proof that the defendant kept the house for profit: “It makes no difference whether he keeps it

- for profit or pleasure, he is guilty." *Scarborough vs. The State*..... 26

ORDINANCE OF 1865.

See *Scaling Ordinance*.

ORDINARY.

1. When the vacancy occurred in the office of the Ordinary, by his resignation, the Clerk of the Superior Court was authorized to perform all the duties which the Ordinary could have performed as Clerk. *Bosworth vs. Walters et al.*..... 635

ORDINARY—COURT OF.

See *Amendment*, 4, 5, 6.

PARTIES.

1. The Western Union Telegraph Company was a proper party complainant to the bill, it being interested in the result of the litigation under its contract with the Southwestern Railroad Company for the exclusive use of the right of way of said railroad to operate and maintain its own line of telegraph. *Southwestern Railroad Company vs. Southern and Atlantic Telegraph Company*..... 43
2. Where F. and N. purchased land jointly from M., giving their notes for the purchase money and taking his bond for titles, and F. paid the whole of the purchase money, and N. having died, F. demanded the titles to be made to himself, and brought suit on the bond in the names of F. and N. for F.'s use:
Held, That as the purchase was joint and the bond joint, it was no breach of the bond to refuse to make titles to F. alone. *Field et al. vs. Martin, administratrix*... 99
3. The suit could not be maintained in the name of F. and N. for the use of F., N. being dead. *Ibid*.

PARTNERSHIP. See *Estoppel*, 9. See *Set-off*, 4.

PARTY-WALL.

1. The building of a party-wall by the plaintiff, under a parol agreement with the defendant that he would pay for one-half of as much of the wall as he used, when

- he built, is such a part performance of the contract as takes it out of the statute of frauds. *Rawson vs. Bell...* 19
2. If a parol agreement, in relation to the building of a party-wall, has been fully executed by both parties, it creates an easement which attaches to and runs with the land. *Ibid.*
 3. Where the defendant, having contracted with the plaintiff to pay for so much of a party-wall as he used when he built, conveys his lot to a third person, having thus put it out of his power to build, he becomes liable to the plaintiff. *Ibid.*
 4. As no time was specified within which the defendant was to build and pay the plaintiff for one-half of the wall to be used by him, the law will imply that it was to be done within a reasonable time. *Ibid.*

PERSONALTY. See *Sale*, 1, 2, 3.

PLEADING.

1. Where a suit is brought by administrators against an attorney for money collected by him as their attorney, and not as an attorney for their intestate, the allegation in the pleadings of their representative character is mere surplusage, as they were entitled to maintain the action in their own names. *Kenan, executor, vs. DuBignon et al., administrators* 258
2. Suit being brought by administrators, proof of their representative character is unnecessary, unless denied by plea. *Ibid.*
3. In a suit against the Ordinary of a county for taxes alleged to have been illegally collected from the plaintiff, the declaration must set forth the facts showing such illegality. *Montgomery & West Point Railroad Company vs. Duer, Ordinary*..... 271
4. Where the note sued on is alleged to have been paid by the transfer of notes and accounts, it is unnecessary to set them out in the plea of payment. *Wardlaw vs. McConnell, executrix*.. 272
5. When the defendant, in a suit at law, sets up a legal defense, and the plaintiff desires to reply some equitable matter, he may do so, but he must amend his declaration so as to plainly and distinctly set forth such equitable reply. *Smith vs. Eason*.....

6. The declaration of a plaintiff who sues on a written contract must set forth a complete and valid contract, even when suit is brought under Jones' form of pleading. Therefore, in a suit against a county on a bond given, after the adoption of the Code, by the Justices of the Inferior Court, the pleadings must show, affirmatively, that the contract was entered upon the minutes of the Inferior Court. Without such entry, the contract would not be valid, under section 527 of the Code, if good in other respects. *Pritchett, administrator, vs. Inferior Court of Bartow county*..... 462
7. A defendant in a suit at common law cannot, by plea, set up an equitable defense and obtain a decree in his favor, where a Court of chancery would refuse it, on a bill filed by him for the purpose, for want of proper parties. Hence, if a guardian sue a corporation for dividends belonging to his ward, the company cannot, by an equitable plea, avail themselves, as a defense, of the fact that they paid the dividends to one not authorized to receive them, and that the money was applied to the support of the ward by the person receiving it, that person not being a party to the suit. *Southwestern Railroad Company vs. Chapman, guardian*..... 538
8. The judgment of the Court below dismissing a suit upon an erroneous ground will not be sustained, because there is a defect in the declaration upon which the suit might have been dismissed, but which could be cured by amendment. *Jackson vs. Gayden*..... 645

POSSESSORY WARRANT.

1. Where notes and liens, payable to the order of plaintiffs, for goods sold, belonging to them, were in the possession of their agent, with no authority to transfer, and were represented by said agent to have been lost, and were found in the possession of the defendant, who denied knowing anything about them, on inquiry made, the magistrates, on the trial of a possessory warrant for the same, properly awarded the possession to the plaintiffs. *Wilcox, Gibbs & Company vs. Turner* 218
2. The fact that the plaintiffs took the note of their agent for the amount of the liens and notes alleged to have been lost, with the stipulation that when found,

the same should be credited thereon, does not defeat the right of the plaintiffs to the possession of their property. *Ibid.*

3. The written notice required by section 3987 of the Code, to be given by the plaintiff in *certiorari* to the opposite party in interest, need not appear of record, if there is a waiver in writing of the notice. *New vs. LeHardy*..... 616
4. Under section 3956 of the Code, a possessory warrant lies at the instance of the party injured, in two classes of cases: First, where any personal chattel has been taken, enticed or carried away, either by fraud, violence, seduction or other means from the possession of the party complaining. Secondly, where such personal chattel, having recently been in the quiet, peaceable and legally acquired possession of the complaining party, has disappeared without his consent. In the first class of cases no lapse of time will bar the plaintiff's right to recover, if he makes out his case in other respects, where the defendant fails to show that such property has been in his quiet and peaceable possession for four years next immediately preceding the issuing of the warrant, or, perhaps, in the quiet and peaceable possession for that length of time, of those under whom he claims. *Ibid.*

PRACTICE IN THE SUPERIOR COURT.

1. It is not an expression of opinion by the Judge, as to what has been proven on the trial of an indictment for keeping a lewd house, to say to the defendant's attorney, (who is addressing the Court upon the law of the case,) in reply to the claim of the attorney, that there must be proof that the defendant kept the house for profit: "It makes no difference whether he keeps it for profit or pleasure, he is guilty." *Scarborough vs. The State*..... 26
2. When the State's counsel in a criminal case, in addressing a jury, is making statements not in proof, and one of the defendant's counsel objects, but another says let him go on, it is not a ground for new trial, if the Judge fail to interfere until the matter is again insisted upon by the defendant's counsel; nor will the verdict be set aside because the Judge, in his charge, fails to say to the jury that they are not to notice such

- statements, there being no request for such a charge.
Ibid.
3. This Court will reluctantly interfere with the discretion of the Judge below in his direction of the business of the Court, and never unless manifest injustice have come to the party complaining. *Parker vs. Fulton Building and Loan Association* 166
 4. The defendant having been furnished with a copy of the indictment before it was sent before the grand jury, it was not error in the Court to refuse to direct him to be furnished with a second copy. *Lynes vs. The State*..... 208
 5. When, on the trial of an indictment for "burglary in the night time," the jury, after retiring, returned into Court and asked if they could find the defendant guilty of any other offense than that charged in the bill of indictment, and the Court informed them "that they could not; that they must find him guilty or not guilty of burglary in the night time," and the jury found the defendant "guilty:"
Held, That this instruction of the Court to the jury was not such as the prisoner could complain of, and the evidence being such as to justify the verdict, a new trial ought not to be granted. *Williams vs. The State*. 212
 6. An accessory before the fact to the crime of arson cannot be put upon his trial until after the conviction of the principal felon, at least not without some special reason recognized by law, showing why the principal has not been tried. *Smith vs. The State*..... 298
 7. Where a verdict is plain and unmistakable in its terms and legal effect, it is error in the Court to permit counsel for the party against whom the verdict is rendered to interrogate the jury, on the reading of the verdict by the Clerk, as to what they intended by their verdict. The verdict in such a case not being ambiguous must speak for itself. *Anderson vs. Green, executor*..... 361
 8. A judgment rendered by the Judge of the Superior Court, without the verdict of a jury, in a civil case founded on contract, when an issuable defense is filed on oath, should be set aside. *Erambert vs. Scarborough*. 398
 9. Where an execution was levied upon a lot of cotton which was sold and the money arising from the sale

was claimed under a distress warrant for rent of the land on which the cotton was made, and the Court adjudged the warrant irregular but refused to pass any order disposing of the money until the landlord could procure a new distress warrant, which he did before the adjournment of the Court, and the money was awarded to him:

Held, That this was not error. *Harrison vs. Guill et al.* 427

10. Where a bill was filed by the legatees of an estate against the executors, praying an account and settlement, and the jury find in favor of two of the complainants only, directing certain specific assets on hand to be turned over to them, saying nothing about the other complainants:

Held, That, as in equity, the jury may find a special verdict, this verdict is not void, as not disposing of the issues. *Shell et al., executors, vs. Sanders et al.*.... 469

11. The Chancellor may, in the final decree, dispose of the whole case in accord with the verdict, and it is, therefore, sufficient. *Ibid.*

12. Where, on the trial of a bill for account and settlement in favor of the legatees of an estate against the executors, the jury found that one of the executors was not liable to the legatees at all, and the verdict directed certain notes and assets to be turned over by the other executor to the legatees, and two of these notes were the notes of the executors, made by them as memoranda of moneys belonging to the estate, used by them:

Held, That the verdict was illegal. The jury should have found against the executors a money verdict for the amount of the notes, and it was right in the Court to grant a new trial. *Ibid.*

13. Evidence which ought properly to have been offered in chief, but which was then omitted through inadvertence, if offered with the rebutting evidence, should be admitted if otherwise unobjectionable. *Dennis et al vs. Weekes*..... 514

14. When there has not been personal service on the defendant in a suit on an open account, the plaintiff must prove his claim to the satisfaction of the Court by competent testimony before he is entitled to a judgment, although no issuable defense has been filed on oath. *Jones vs. Adams*.....

15. The judgment of the Court below dismissing a suit upon an erroneous ground will not be sustained, because there is a defect in the declaration upon which the suit might have been dismissed, but which could be cured by amendment. *Jackson vs. Gayden*..... 645
16. Where, upon the trial of the defendant for the offense of an assault with intent to murder, the jury returned a verdict finding "the defendant guilty of an assault with intent to kill," and upon being remanded to the jury-room, with instructions from the Court, returned a general verdict of "guilty," a motion in arrest of judgment, based upon the facts aforesaid, was properly overruled. *Williams vs. The State*..... 647

PRACTICE IN THE SUPREME COURT.

1. The bill of exceptions should specify the portion of the charge to which exception is taken. *Rawson vs. Bell*..... 19
2. The grounds of alleged error, set forth in the motion for a new trial, must be identified by the Judge as true, or they will not be considered on a writ of error based thereon to this Court. The usual certificate to the bill of exceptions is not sufficient. *Elliott vs. The State*..... 159
3. At the July Term, 1871, the death of Greer was suggested, and an order was passed allowing the plaintiff in error to open the record at the next term of the Court, and providing for its publication. At the January Term, 1872, the case was continued for want of parties. At the July Term, 1872, the writ of error was dismissed, on motion of defendants in error, upon the ground that said order had never been served, either personally or by publication. *Henderson vs. Greer et al*..... 566
4. When the bill of exceptions fails to show, affirmatively, that the certificate of the Judge was given within thirty days from the adjournment of the Court at which the rulings complained of were made, the writ of error will be dismissed. *Wallon vs. Morgan*.. 567
5. The verdict in this case is fully sustained by the evidence, and this Court will, in its judgment, award damages against the plaintiff in error, on the ground

that the case was brought up for delay only. *Mercier vs. Mercier*..... 643

PREScription.

1. Where a tenant in common conveys the whole lot to a third person, and the grantee took possession, claiming the entire lot as his own, this action constitutes a disseizin and ouster of the other tenants in common, and they are barred from asserting their right to such property after the expiration of seven years. *Horne et al. vs. Howell*..... 9
2. Where a prescriptive title is set up in defense to an action of ejectment, it is competent for the defendant to show the good faith with which he purchased. *Ibid.*

PREsUMPTION.

See *Promissory Notes*, 6.

" *Will*, 6.

PRINCIPAL AND AGENT.

1. Where notes and liens, payable to the order of plaintiffs, for goods sold belonging to them, were in the possession of their agent, with no authority to transfer, and were represented by said agent to have been lost, and were found in the possession of the defendant, who denied knowing anything about them on inquiry made, the magistrates on the trial of a possessory warrant for the same, properly awarded the possession to the plaintiffs. *Wilcox, Gibbs & Co. vs. Turner*..... 218
2. The fact that the plaintiffs took the note of their agent for the amount of the liens and notes alleged to have been lost, with the stipulation that when found the same should be credited thereon, does not defeat the right of the plaintiffs to the possession of their property. *Ibid.*
3. Where a plaintiff sues for damages sustained from having been pushed off a car of defendant, while in motion, by a negro, who emerged from the car and stated that he was in charge of the same; this declaration, unless brought to the knowledge of the defendant or its agents, who had charge of the train at the time, is insufficient to make the defendant liable for

the acts of the negro as its servant. *Lindsay vs. Central Railroad and Banking Company* 447

PRINCIPAL AND SECURITY.

1. The Legislature has authority to appoint, by resolution, a committee of their own body, as ministerial agents, to audit and state the accounts of the officers and agents of the Western and Atlantic Railroad. Where such statement shows an officer or agent in default, and is transmitted by the committee to the Comptroller General, and he thereupon issues executions against the defaulting officer and his sureties, this Court will presume that he has satisfied himself of the correctness of the committee's report by inspection of the books and accounts of the Western and Atlantic Railroad, and adopted it as his own. *Scofield et al. vs. Perkerson et al.*..... 325
Hinton et al. vs. Same..... 325
2. The Courts will not entertain jurisdiction to enjoin such execution on the ground that there is a suit pending, at the instance of the State, against the defaulting agent and their securities on their bond, or on the ground that the amount for which the agent is a defaulter, was fraudulently used and embezzled by him. *Ibid.*
3. A surety whose principal has been adjudged a bankrupt, when sued for the debt on which he is surety, cannot set off against it usurious interest paid by his principal to the creditor, on transactions other than the one out of which the debt arose, on which the surety is sued. *Woolfolk vs. Plant & Son*..... 422
4. To discharge a surety on account of extension of time by the creditor to the principal debtor there must not only be an agreement for the extension, but the indulgence must be for a definite period. *Ibid.*
5. The dismissal of a possessory warrant for cotton, (upon failure to find it in the possession or control of the warehouseman with whom it was deposited and against whom the warrant issued,) by the drawee of a draft, who held the warehousemen's receipt for the cotton, as collateral security for the payment of the draft, and at whose instance the warrant issued, does not discharge the accommodation drawer, even though the

warehousemen were the acceptors of the draft, and the draft on its face directed the cotton to be sold and the proceeds applied to its payment. *Ibid.*

6. Where the defendant signed a note, given by a member of a firm individually, for money borrowed for the use of the firm, as security, and upon a settlement of the partnership affairs, that note was settled by the acceptance by the plaintiff of a note made by said partner, without security, and the defendant was not present, assenting thereto, that would discharge him from his liability as security. *Simmons vs. Guise*..... 473

PROMISSORY NOTES.

1. Where notes and liens, payable to the order of plaintiffs, for goods sold belonging to them were in the possession of their agent, with no authority to transfer, and were represented by said agent to have been lost, and were found in the possession of the defendant, who denied knowing anything about them on inquiry made, the magistrates on the trial of a possessory warrant for the same, properly awarded the possession to the plaintiffs. *Wilcox, Gibbs & Co. vs. Turner*..... 218
2. The fact that the plaintiffs took the note of their agent for the amount of the liens and notes alleged to have been lost, with the stipulation that when found the same should be credited thereon, does not defeat the right of the plaintiffs to the possession of their property. *Ibid.*
3. When a suit was brought on a promissory note, signed by one claiming to be the agent of the defendant, and there was some evidence that the defendant had accepted, knowingly, the consideration for which the note was given :
Held, That it was error in the Court to rule out the note as evidence. The case should have been submitted to the jury, under the charge of the Court, as to the effect of the defendant's act, should they believe he had accepted, knowingly, the consideration for which the note was given. *Gilbert vs. Dent*.....
4. When a note, payable at bank, is placed in a bank for collection, it is the duty of the bank to see to it that it is properly presented for payment, and on the

dishonor, to have it duly protested, and notice given to the indorsers. *Georgia National Bank vs. Henderson*..... 487

5. When a bill of exchange payable at, was sent to a bank for collection, and the bank treating it as a bank check, and not entitled to days of grace, presented it for payment, and had it protested, etc., on the day of its maturity, without days of grace, by means of which the indorser was discharged, and it was in evidence, that the bank was notified by the indorser at the time that he claimed the paper to have days grace :

Held, That the bank was liable to the person who deposited the paper for collection for damages, for its negligence in not presenting the check, as required by law, and causing notice of its non-payment to be given to the indorser. *Ibid*.

6. The present holder of a negotiable promissory note or bill of exchange is *prima facie*, presumed to have acquired title thereto before its maturity, and in a suit by the holder against the bank to which the paper was sent for collection for failing to present it for payment, and failing to notify the indorser of its dishonor, the present holder is *prima facie* presumed to have been the holder at the maturity of the paper. *Ibid*.

PROTEST. See *Promissory Notes*, 4, 5, 6.

RAILROADS.

1. In the absence of any fraud or collusion on the part of the railroad company, the mere transfer of the stock on the books thereof to the purchaser, by direction of the administrator, will not make the company liable as a guarantor or warrantor of the vendor's title to the stock. *Nutting et al. vs. Thomason et al.*..... 34
2. A railroad company is not liable for injuries sustained by laborers in the employ of a contractor who was working for said company, though it may have furnished implements and materials for the performance of such work. *Central Railroad and Banking Company vs. Grant*..... 417
Same vs. O'Hara..... 417

3. Where a plaintiff sues for damages sustained from having been pushed off a car of defendant, while in motion, by a negro, who emerged from the car and stated that he was in charge of the same; this declaration, unless brought to the knowledge of the defendant or its agents, who had charge of the train at the time, is insufficient to make the defendant liable for the acts of the negro as its servant. *Lindsay vs. Central Railroad and Banking Company*..... 447
4. Where a bill was filed setting up that the complainant had conveyed by deed to a railroad company for laying and using its track, one hundred feet width of the land through his plantation, and trusting to the assurances of the president of the road, that proper stock-gaps should be erected, as they might be needed, had neglected to put in the deed any stipulation as to the gaps, and the bill prayed that the company might be enjoined from running the cars and using the land until the "gaps" were erected:
Held, That the injunction was properly refused by the Judge, even though there might be equity in the bill.
Cook vs. North and South Railroad Company..... 618

REASONABLE TIME.

1. As no time was specified within which the defendant was to build and pay the plaintiff for one-half of the wall to be used by him, the law will imply that it was to be done within a reasonable time. *Rawson vs. Bell*..... 19

RECEIPT. See *Guardian and Ward*, 4, 5.

RECEIVER.

1. A purchase by a Receiver, as agent of another, of property sold at his own sale, made under order of Court, is voidable at the election of a party having a beneficial interest in the property, and when such election is promptly made, the sale will be set aside. *Carr, executor, et al. vs. Houser, administrator* 471

RECORDING INSTRUMENTS.

1. It is not necessary that a Notary Public shall affix his seal to the probate of a deed by a subscribing witness. *Nichols vs. Hampton*.....

2. A mortgage recorded within three months from the date of its execution is a lien from its date, even against *bona fide* purchasers without notice. *Ibid.*
3. An affidavit, probating a mortgage, taken before the attorney of the mortgagee, who is a Notary Public, is not a legal affidavit, and a mortgage recorded on such probate is not legally recorded. *Ibid.*

REFORMATION OF INSTRUMENTS.

See *Equity*, 12.

RELIEF ACT OF 1870.

1. When in November, 1864, a contract was made for board for a year, and in February, 1865, a note was given for the sum agreed on, but the boarding ceased in August, 1865, and in November, 1865, the parties had a settlement, and the equities of their Confederate contract were agreed upon, the true value of the board actually received, settled, and a new note given for what was due:
Held, That this contract of November, 1865, was not a renewal of the note of February, 1865, and that the tax-affidavit, required by the Act of October 13, 1870, was not necessary. *Greene et al. vs. Lowry*..... 55
2. It is not necessary that the declaration shall affirmatively show a case to be within the exceptions mentioned in the 14th section of the Act of October, 13th, 1870, to excuse the filing of the affidavit required by the 2d section of the Act. It is sufficient, if the facts be made to appear to the Court by proof. *Montgomery et al., executors, vs. Pruitt et al.*..... 110
3. Where, in a suit pending on a promissory note dated before the 1st of June, 1865, it appeared that the suit was in the name of an administrator, that a widow and minor children were the sole distributees of the estate, and that the note had been taken by the administrator as part of the consideration of a tract of land sold by him belonging to the estate:
Held, That, *prima facie*, the note was due to the widow and minors, and within the exceptions to the Act of October 13, 1870, so that the tax-affidavit was unnecessary. *Smith, administrator, vs. Howell et al.*..... 128
4. Where it appeared that the debt for which the execution was issued was contracted prior to June 1st, 1865,

that it was for the unpaid purchase money due for the land levied on, that the complainant was, at the time of the commencement of the action on which the judgment and execution were founded, in possession of the land, and is still in possession, it was proper in the Chancellor to refuse an injunction against the sale of the property under said execution, applied for on the ground that the taxes on the debt had not been paid.

Hambrick vs. Dickey et al...... 236

5. To make one a "claimant" of the property, within the meaning of section 5 of the Act of October 13th, 1870, so as to be permitted to file the counter-affidavit there provided for, he must put in a claim to the property, under the claim laws of this State. *Adams vs. Worrill*..... 295

6. Where an action was pending on a contract made before the first of June, 1865, and no tax-affidavit of taxes paid was made as required by the Act of October 13th, 1870, and no motion was made to dismiss for such failure, and a trial was had on the merits, it is too late, after a verdict for the plaintiff, to move for a new trial, on the ground that no affidavit was filed, and no proof given on the trial as to the payment of taxes. *Everett vs. Southern Express Co.*..... 303

7. The failure to make a motion to dismiss is an implied consent that the case does not come within the Act. *Ib.*

8. Where a creditor applies for letters of administration upon the estate of his deceased debtor, it was error in the Court to exclude notes and mortgage to secure the same, made by the debtor, which were offered in evidence to show the indebtedness, on the ground that no affidavit had been filed of the payment of taxes thereon. *Einstein vs. Latimer et al.*..... 315

9. An executor, who has willfully or negligently mismanaged the property in his charge to the injury of a legatee, cannot avail himself of the provisions of the Relief Act of October 13th, 1870, when sued by such legatee. *Anderson vs. Green, executor*..... 321

10. A plaintiff is a competent witness to prove the payment of taxes on the debt sued on, though the other party to the contract may be dead. *Mumford vs. King, executor*..... 322

11. A claim by one partner against his co-partner for an unascertained amount, growing out of partnership..... 323

- transactions, and which can only be ascertained by a settlement of the partnership concerns, is not required, before such settlement, to be given in for taxation. Hence, where a bill is brought to compel such a settlement of a partnership, which ceased business without formal dissolution, before June, 1865, it is not necessary for complainant to file an affidavit of payment of taxes on the claim sought to be enforced. *Lopez vs. McArdle, administrator*..... 430
12. Where, in an arbitration between the guardian of a minor legatee and the executor of an estate, it was decreed that all the notes of the estate should be turned over to the minor as her property :
Held, That in a pending suit on one of the said notes, proof of this award excused the filing of the affidavit required by the Act of October 13, 1870, and this is not met by proof that there are outstanding debts against the estate. *Heartwell, guardian, vs. Tompkins et al*..... 452
13. Where an affidavit of taxes paid, as is required by the Act of October 13, 1870, was filed within the time prescribed, but the affidavit failed to say that "the plaintiff expected to prove the same on the trial:"
Held, That the affidavit is amendable at the trial. *Ferguson vs. New Manchester Manufacturing Company*.. 461
14. Where a holder of bank bills, issued before June, 1865, gives them in regularly at what he swears, on the trial, he was willing to sell them at, and pays the taxes due on that valuation, there being no contradictory evidence of the value of the bills, it is a sufficient compliance with the Relief Act of 1870. *Manufacturers' Bank of Macon vs. Lamar*..... 563
15. In suit on a bond executed before June, 1865, and for the payment of money, upon the happening of a certain contingency, which does not happen until after that date, no affidavit of the payment of taxes need be filed. *Jackson vs. Gayden*..... 645

REMAINDER.

1. Where, in a marriage settlement, certain property was settled upon the wife for life, remainder to the husband for life, remainder to the heirs general of the

- Held*, That the husband took a vested remainder in fee.
Varner vs. Boynton et al...... 508
2. Where the husband, with the consent of the wife, invested a portion of the estate so conveyed in real estate, taking from the vendor a bond for titles, his heirs-at-law have no right to follow the proceeds to the injury of the vendor, a portion of whose debt is still unpaid. *Ibid.*
 3. Where the husband has diverted a portion of the income of the trust estate, and invested the same, without the consent of the wife, in real estate, and subsequently, with her consent, invested a portion of the *corpus* of the estate in the same real estate, the heirs-at-law of the husband have no right in the remainder of the *corpus*, as against the right of the wife to be reimbursed for so much of the increase as was so diverted and invested. *Ibid.*

RES ADJUDICATA.

1. An award having been made the judgment of the Court without objection, equity will not interfere to set it aside on account of fraud in the original cause of action, or of fraud in obtaining the complainant's consent to the arbitration, where all the facts were known at the time of the motion to make the award the judgment of the Court. *Clark et al. vs. Thurmond.*..... 97

RESCISSION. See *Sale*, 2.

SALE.

1. When there is a sale of goods, with a warranty of quality, and a delivery and acceptance by the buyer, and the goods prove not to correspond with the warranty, and there is no fraud by the seller, the measure of damages is the difference between the price paid and the value of the goods as they actually were at the time and place of the sale and delivery, together with such consequential damages, if any there be, as come within the rule, excluding indirect and speculative damages. *Clarke & Company vs. Neufville.*..... 261
2. There can be no rescission, by the buyer, of a contract, in a case of the sale and delivery of goods, unless the buyer return or offer to return the goods, and if, by his own act, as by a sale of a portion of them, he

render such delivery impossible, the buyer cannot, of his own motion, rescind. *Ibid.*

3. Title to personal property may pass by sale without present delivery; but a mere promise to deliver, for a consideration paid, after the owner shall have done something necessary to enable him to deliver, does not pass title. The intention of the parties will govern. Thus, where A buys land of B, for which he gives him the note of a third person, and they afterwards cancel their trade, but B, having lost the note, promises to have a copy established, and then to deliver it in lieu of the lost original, or to deliver the original if found, the title to the note passed to A or not, at the time of the cancellation of the land trade, according as the parties may have intended. The jury in this case having found that the parties did not intend to pass the title to the note until it was safely delivered to A, which finding is supported by evidence, the verdict will not be disturbed. *Cheney et al. vs. Dalton*..... 401
4. When a merchant sells an article as a fertilizer, at the market value of that particular kind or description of fertilizer, the law implies that he warrants to the purchaser thereof, that the article sold is a merchantable article, and reasonably suited to the use for which it is purchased; and if it is not, the defendant may plead it in abatement of the purchase money agreed to be paid therefor. *Radcliff vs. Gunby & Co.* 464

SAW MILL LIEN. See *Lien*, 3, 4, 5.

SCALING ORDINANCE.

1. This being a Confederate contract, the amount to be paid must be determined under the provisions of the Ordinance of 1865. *Clark et al. vs. Lyon et al.*..... 202
2. Where a defendant is sued upon a note given in the year 1863, in part payment for property, of which he was in possession of an undivided half at the time of the trial, he is entitled to the benefit of the provisions of the Ordinance of 1865, notwithstanding his refusal to deliver up the property for the note. *Lumsden vs. Manes*..... 393
3. A State bank, not specially authorized by its charter to do so, could not, in 1862, issue any of its bills, intended to be used as money, redeemable otherwise than with gold or silver coin. Where it did issue bills

at that date, in the usual form, it is inadmissible in a suit on them by a *bona fide* holder, who did not receive them from the bank, but purchased them from others, to prove that they were intended by the bank to be payable in Confederate currency, and were so understood by the community in which the bank was located. The Ordinance of 1865 does not apply to such contracts. *Manufacturers' Bank of Macon vs. Lamar* 563

SECURITY. See *Principal and Security*.

SET-OFF.

1. To establish a set-off, the law requires the same evidence as if the defendant had originally sued the plaintiffs on the claim. *Wilson & Co. vs. Walker* 319
2. The jury having returned a verdict in favor of the defendant on his plea of set-off, and there not being sufficient evidence to create a *prima facie* liability of the plaintiffs on the same, a new trial will be granted. *Ibid.*
3. A surety whose principal has been adjudged a bankrupt, when sued for the debt on which he is surety, cannot set off against it usurious interest paid by his principal to the creditor, on transactions other than the one out of which the debt arose, on which the surety is sued. *Woolfolk vs. Plant & Son* 422
4. In a suit on a promissory note due to A, a set-off due to the defendant by a partnership of which A is a member, cannot be pleaded either at law or equity unless there be special circumstances also pleaded, to avoid the want of mutuality between the two debts. *West vs. Kendrick* 526

SHERIFF.

1. Where a sheriff fails to advertise and sell goods levied on under a mortgage *fi. fa.* on the 10th of April, 1871, until the first Tuesday in October, upon the ground that the defendant notified him that he would apply for a homestead exemption in said property, which exemption was not set apart until September 19th, 1871, upon application in behalf of plaintiffs in *fi. fa.*, a rule absolute should be issued against him. *Kimbro & Company vs. Edmondson* 130
2. An appointment by the Judge of the Superior Court,

- of one to perform the duties of sheriff, under section 251 of the Revised Code, holds until there is an election of some one to fill the vacancy, as provided by law, and no longer. *Heys vs. Walters*..... 386
3. Notice given to one deputy sheriff by the tax collector, under the circumstances set forth, to satisfy the tax *fi. fa.* with the money first made, is notice to all. *Beatie vs. Brown et al*..... 461
4. Where the securities of a sheriff applied to the Governor to be released from his bond, and the Governor ordered the sheriff to give another bond with security to the Ordinary of the county, within ten days; on failure to comply within the time prescribed, he forfeited his right to exercise the duties of the office, although there may have been a vacancy in the office of Ordinary during the period. *Bosworth vs. Walters et al*..... 635

SPECIFIC PERFORMANCE. See *Equity*, 6.

STATUTE OF FRAUDS. See *Frauds, Statute of*.

STATUTE OF LIMITATIONS.

See *Limitation of Actions*.

STEAMBOAT LIEN. See *Lien*, 8, 9.

TAX.

1. In a suit against the Ordinary of a county for taxes alleged to have been illegally collected from the plaintiff, the declaration must set forth the facts showing such illegality. *Montgomery and West Point Railroad Company vs. Duer, Ordinary*..... 272
2. The remedy against the superintendent and the other officers of the Western and Atlantic Railroad is the same as against tax collectors and receivers. *Scofield et al. vs. Perkerson et al; Hinton, et al. vs. Same*..... 350
3. A sale of the land by the assignee of a bankrupt does not divest the lien of the State upon the land for taxes due on it, even though sold by the assignee free of incumbrance. *Stokes vs. The State and County*.... 412
4. An execution issued by the tax collector for the unpaid taxes against the land, which has not been returned by any one, describing it as the property of the persons who last returned it, is valid against the land,

although such persons may no longer be the owners of it, and may not have owned it at the time the law fixes the liability for taxes, to-wit: the first day of April. *Ibid.*

5. A claim by one partner against his co-partner for an unascertained amount, growing out of partnership transactions, and which can only be ascertained by a settlement of the partnership concerns, is not required, before such settlement, to be given in for taxation. Hence, where a bill is brought to compel such a settlement of a partnership, which ceased business without formal dissolution, before June, 1865, it is not necessary for complainant to file an affidavit of payment of taxes on the claim sought to be enforced. *Lopez vs. McArdle, administrator*..... 430
6. While it is true, as a general rule, that no judicial interference can be had in any levy or distress for taxes, yet where it happens that the tax collector placed a tax *fi. fa.* in the hands of the sheriff, with instructions to collect the same out of the first money that should come into his hands from the sale of the defendant's property under an execution held by him, and the sheriff did sell property of the defendant for more than enough to pay off the tax *fi. fa.*, under other executions, and application was made to the tax collector for his consent to have this money paid over to such executions, which he refused, and the sheriff thereupon took the responsibility of paying over the money to the levying executions and then of his own motion levied the tax *fi. fa.* upon other property of the defendant without instructions to do so from the tax collector, the sheriff will be enjoined from proceeding under the tax *fi. fa.* at the instance of a creditor of the defendant, who has attached the property last levied on, who states in his bill that the defendant is insolvent, and that if complainant is deprived of this means of securing this debt by the action of the sheriff, he will lose it, it being apparent that the sheriff levied the tax *fi. fa.* for his own protection and not for the benefit of the State. *Beatie vs. Brown et al.* 455
7. Notice given to one deputy sheriff by the tax collector, under the circumstances set forth, to satisfy the tax *fi. fa.* with the money first made, is notice to all. *Ibid.*

TENANTS IN COMMON.

1. Where a tenant in common conveys the whole lot to a third person, and the grantee took possession, claiming the entire lot as his own, this action constitutes a disseizin and ouster of the other tenants in common, and they are barred from asserting their right to such property after the expiration of seven years. *Horne et al. vs. Howell* 9
2. Where a prescriptive title is set up in defense to an action of ejectment, it is competent for the defendant to show the good faith with which he purchased. *Ibid.*

TROVER.

1. It is error in the Court to charge the jury in a trover case, that a demand and refusal is proof of conversion, it not appearing that the property sued for was in the possession, power, or control of the defendant, at the time of the demand and refusal, but if in such a case, there be conclusive proof of a conversion in fact, a new trial ought not to be granted. *Seago vs. Pomeroy*..... 227
2. When the owner of a past due promissory note placed it in the hands of A for collection, and A sold it to B, and B converted it to his own use :
Held, That the true owner might maintain trover for the note against B, and that B got no title by his purchase from the agent. *Ibid.*

TRUSTS.

1. Implied trusts are not within the statute of frauds, and the Courts will hear parol evidence, showing the facts from which they are sought to be implied. *Alexander, executrix, vs. Alexander et al.*..... 283
2. Where one holds the legal title to property, but the same has been paid for by or with the funds of another, the law implies a trust. *Ibid.*
3. Where a guardian has purchased property with the funds of his wards, and has, by his written and sworn answer to a bill in equity, so declared, and that he holds it for their use, the wards may recover the property in a Court of law, notwithstanding it may appear that the guardian took the deed to himself, making no mention of his wards. *Ibid.*
4. Receipts in full by wards to their guardian, which,

liability, may be explained by parol, and will only cover such matters as were intended to be covered thereby. *Ibid.*

5. A receipt in full by a ward to his guardian, discharging him from all claims the ward may have against him, in law or in equity, does not convey to the guardian any title to the land held by the guardian for him, even though the same be held under an implied trust, especially if, at the time of the receipt, the ward has reason to believe that the title of the land is to the guardian as guardian. *Ibid.*

USURY.

1. Where a suit to recover usury paid was brought against a Loan and Building Association, chartered by the Superior Court in favor of one who has been a member and borrower, and who, failing to comply with the rules, as to the payment of his monthly dues, had, by way of settlement, conveyed to the company certain real estate at an agreed price in full discharge of his obligations, and it appeared in proof that the company consisted of two thousand shares; that \$1 00 per month was to be paid upon each share until the accumulations should make each share worth \$200 00; that the monthly receipts were to be used in advancing to the shareholders on their ultimate interest at such rates of premium as the money might bring at auction, and that each shareholder, taking an advance, was to pay \$1 00 extra upon each share advanced upon, giving a real estate mortgage to secure the performance by him of his agreement to pay his dues as the constitution of the company required:

Held, That the contract of a member taking an advance according to the rules, was not usurious *upon its face*, whatever might be the premium at which he agreed to take the advance. *Parker vs. Fulton Loan and Building Association*..... 166

2. Whether such a contract, though *legal* upon its face, was, in fact, illegal, would depend upon the object of the association. If it were, in truth, a mere device to evade the usury laws, then it would be illegal, if in fact more was taken for the use of money than seven per cent. per annum. But if the organization were in fact and *bona fide* a plan with the real intent and object of "accumulating a fund by monthly subscriptions or savings of the members thereof, to assist

them in procuring for themselves such real estate as they may deem proper," then it would not be illegal; and this being a question of fact, depending upon evidence, it was proper for the Judge to leave it to the finding of the jury. *Ibid.*

3. When no other facts appear to the jury, by the proof, going to show the object of such an association than the Constitution, and the contract made in accordance therewith, a verdict of the jury that the contract is not illegal, is not only supported by, but is required by the evidence. *Ibid.*
4. If a contract claimed by one of the parties to be usurious and by the other not, is compromised and settled between them, the question of dispute as to the usury, forming a distinct item of the settlement, this is an accord and satisfaction even as to the usury, and the money paid cannot be recovered back, but a mere compromise and settlement of the debt without a distinct reference to the dispute as to the illegality of the contract is not a bar to a suit to recover back the usury paid. *Ibid.*
5. A surety whose principal has been adjudged a bankrupt, when sued for the debt on which he is surety, cannot set off against it usurious interest paid by his principal to the creditor, on transactions other than the one out of which the debt arose, on which the surety is sued. *Woolfolk vs. Plant & Son*..... 422

VENUE. See *Domicil*, 1, 2, 3.

VERDICT.

1. Where a verdict is plain and unmistakable in its terms and legal effect, it is error in the Court to permit counsel for the party against whom the verdict is rendered to interrogate the jury, on the reading of the verdict by the Clerk, as to what they intended by their verdict. The verdict in such a case not being ambiguous must speak for itself. *Anderson vs. Green, executor*.. 361
2. Where a legatee files a bill against the executor of the will under which the complainant claims, to compel the payment of his legacy and the executor sets up the defense of *plene administravit præter*, which is controverted by the complainant, and the jury found the following verdict: "We, the jury, find the sum of \$5,000, with legal interest thereon from the 24th day of November, 1855, for the complainant, John An-

liability, may be explained by parol, and will only cover such matters as were intended to be covered thereby. *Ibid.*

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2. Where a legatee files a bill against the executor of the will under which the complainant claims, to compel the payment of his legacy and the executor sets up the defense of *plene administravit præter*, which is controverted by the complainant, and the jury found the following verdict: "We, the jury, find the sum of \$5,000, with legal interest thereon from the 24th day of November, 1855, for the complainant, John An-

derson, to be raised out of the estate of A. H. Anderson, deceased, in the hands of Moses P. Green, executor," the complainant is entitled to a judgment *de bonis testatoris et si non de bonis propriis*. *Ibid.*

3. The decree of the Chancellor should conform to the verdict. Where a decree was rendered by the Chancellor not conforming to the verdict, and pending a motion by defendant for a new trial, complainant excepted to the decree rendered and brought the case to this Court, where the bill of exceptions was dismissed as prematurely sued out, and at the hearing of the motion for a new trial, complainant again moved to reform the decree, so as to make it accord with the verdict, which motion to reform the Chancellor again entertained and overruled, and also granted the new trial, to all of which complainant excepted within the thirty days required by the statute, he is not estopped from assigning error upon the ruling of the Chancellor refusing to reform the decree. *Ibid.*
4. Where the verdict of the jury is for a sum not more than the evidence shows the complainant is entitled to, a new trial will not be granted because they may have arrived at the result by an erroneous calculation—conceding that, in this case, the mode of calculation adopted by the jury was erroneous. *Ibid.*
5. Jurors cannot be heard to impeach their verdict. *Ib.*
6. Where a bill was filed by the legatees of an estate against the executors, praying an account and settlement, and the jury find in favor of two of the complainants only, directing certain specific assets on hand to be turned over to them, saying nothing about the other complainants:
Held, That, as in equity, the jury may find a special verdict, this verdict is not void, as not disposing of the issues. *Shell et al. vs. Sanders et al* 41
7. The Chancellor may, in the final decree, dispose of the whole case in accord with the verdict, and it is, therefore, sufficient. *Ibid.*
8. Where, on the trial of a bill for account and settlement in favor of the legatees of an estate against the executors, the jury found that one of the executors was not liable to the legatees at all, and the verdict directed certain notes and assets to be turned over by the other executor to the legatees, and two of ~~these~~ notes were the notes of the executors, made by ~~them~~:

as memoranda of moneys belonging to the estate, used by them :

Held, That the verdict was illegal. The jury should have found against the executors a money verdict for the amount of the notes, and it was right in the Court to grant a new trial. *Ibid*.

WAREHOUSEMEN. See *Carriers*, 2, 3, 4.

WARRANTY.

1. When there is a sale of goods, with a warranty of quality, and a delivery and acceptance by the buyer, and the goods prove not to correspond with the warranty, and there is no fraud by the seller, the measure of damages is the difference between the price paid and the value of the goods as they actually were at the time and place of the sale and delivery, together with such consequential damages, if any there be, as come within the rule, excluding indirect and speculative damages. *Clark & Company vs. Neufville*..... 261
2. If B buy land from A and take possession, he cannot resist the payment of the purchase money if he has not been disturbed in the possession by showing A's want of title, unless he show that A is insolvent, or show other facts to establish the insufficiency of his warranty. *Booth vs. Saffold*..... 278
3. When a merchant sells an article as a fertilizer, at the market value of that particular kind or description of fertilizer, the law implies that he warrants to the purchaser thereof, that the article sold is a merchantable article, and reasonably suited to the use for which it is purchased; and if it is not, the defendant may plead it in abatement of the purchase money agreed to be paid therefor. *Radcliff vs. Gunby & Company*..... 464
4. A deed, or bond for titles to a tract of land, by its number in the State survey, binds the obligor to make title to the land within the boundaries of such survey, and if a part be sold off before the date of the deed, this is a breach of the bond; nor is this breach excused by the fact that the quantity sold off is small, and the bond describes the number, containing two hundred and two and one-half acres, more or less. *Smith vs. Eason*..... 316
5. Proof that the obligee in a bond for titles knew that the obligor was not the owner of the whole of the land described in the bond, is no reply to a plea of a breach,

unless it appear that there was a mistake in the description. *Ibid.*

WESTERN AND ATLANTIC RAILROAD.

1. On the abolition of the offices of the Western and Atlantic Railroad, the Comptroller General became the proper custodian of the books and records of the road, and the duty of causing the true amount due by defaulting officers of the road to be ascertained devolved upon him. *Scotfield et al. vs. Perkerson et al. ; Hinton et al. vs. same*..... 32
2. The Legislature has authority to appoint, by resolution, a committee of their own body as ministerial agents, to audit and state the accounts of the officers and agents of the Western and Atlantic Railroad. Where such a statement shows an officer or agent in default, and is transmitted by the committee to the Comptroller General, and he thereupon issues executions against the defaulting officer and his sureties, this Court will presume that he satisfied himself of the correctness of the committee's report by inspection of the books and accounts of the Western and Atlantic Railroad, and adopted it as his own. *Ibid.*
3. The remedy against the superintendent and the other officers of the Western and Atlantic Railroad is the same as against tax collectors and receivers. *Scotfield et al. vs. Perkerson et al. ; Hinton et al. vs. Same* 35

WILL.

1. Where there is no ambiguity on the face of a will, parol evidence is inadmissible to explain it. *Hill et al. vs. Alford*..... 247
2. Where a will provided that, as testator's children should marry or come of age, the executor should give off such portions of the property as he thought proper, the title to the same remaining in the estate until the youngest child should marry or come of age, when it should be brought into the general fund and a final division take place, and in case all the children should die without leaving children at the time of their death, then the property to pass to the Inferior Court of Putnam county, for certain specified purposes ; and the youngest having survived all the children, and having been placed in possession of the entire estate, and having died after he arrived at full age, leaving two children :

- Held*, That the purchasers, under an execution against said youngest child, obtain a valid title thereto as against his children. *Ibid.*
3. Probate of a will in common form unattacked for seven years, is conclusive, upon all parties in interest, except minor heirs-at-law. *Anderson vs. Green, exe'r.* 361
 4. A legatee is not barred from asserting his claim to a legacy against the executor where suit is brought within ten years after the legatee arrives of age. *Ibid.*
 5. Where a will has been proved in common form for more than seven years, a legatee does not waive the estoppel thereby created by filing his bill against the executor for an account and discovery. *Ibid.*
 6. The law presumes a testator, in making his will, to have had a legal intention in view until the contrary is shown. *Ibid.*
 7. Where a will, executed in July, 1850, the testator dying in 1859, conveys property in trust, the proceeds to be applied to the benefit of certain slaves, and provides that the survivor shall receive the whole benefit, the clause is inconsistent with the provisions of the fourth section of the Act of 1818, against manumission, and therefore void. *Bennett et al. vs. Williams, administrator.....* 399
 8. The will must be construed under the law as it existed at the time of the death of the testator. *Ibid.*
 9. Where a testator, in 1854, made his will, by which he left certain land to his son, whom he appointed executor, and in 1856 conveyed the land to his son by deed, reserving a life estate to himself, and delivered the deed to his son, the legacy is adeemed. If, on the death of the testator in March, 1864, the son takes immediate possession of the land, claiming it under the deed, and in January, 1865, prove the will and qualify as executor, but does not return the land as part of his father's estate, he is not estopped by the probate and his qualification as executor, without more, from setting up his title under the deed adverse to the will. *Worrill, and administrator, et al. vs. Gill, administrator.....* 482
 10. On the investigation of an issue of *devisavit vel non*, where one of the grounds of the caveat is, that the executor did, by fraud and deceit, and fraudulent and false representations, procure the testator to make the will, the admission of the executor, who takes an inter-

est under the will, made after qualification, in reference to the conduct or acts of the executor himself, as to a matter relevant to the issue, (and his statement that he had procured the testator to make the will for certain purposes is such) should have been admitted as evidence in chief. *Dennis et al. vs. Weekes*..... 5

11. The fact that such evidence was admitted in rebuttal to impeach the executor, who testified as a witness in favor of the will, is not the full measure of the rights of the caveators, and they are entitled to a new trial on account of the rejection of this testimony as evidence in chief. *Ibid.*

12. Where one of the grounds of caveat is undue influence exercised by the executor of the testator, in procuring him to make the will, evidence showing that the executor, as agent of the testator in 1863 or 1864, applied to the Confederate conscripting officer to have a white man exempted from military service for the purpose of overseeing the plantation of the testator, on the ground that the latter was so unsound in mind as to be incapable of attending to his own business, is admissible as evidence in chief for what weight the jury may give to it, to show the executor's knowledge of the state of the testator's mind, where the evidence, with the exception of that of the executor himself, shows that the executor exerted his influence over the testator (which was proved to be very great,) to have the will made, and all the witnesses testify that the testator had been a man of very weak, if not entirely unsound mind for fifteen years before his death, which occurred in 1869. *Ibid.*

WITNESS.

1. In divorce cases, the husband is an incompetent witness to prove the adultery of his wife. *Cook vs. Cook* 3
2. A plaintiff is a competent witness to prove the payment of taxes on the debt sued on, though the other party to the contract may be dead. *Mumford vs. King*..... 4
3. Upon the hearing of the motion to make an injunction permanent, it is not error in the Chancellor to receive the affidavit of the wife of one of the defendants, in relation to facts not coming to her knowledge from confidential communications of her husband. *Davis vs. Weaver et al.*..... 4





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